TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 179

B. FRANK PARTRIDGE, PLAINTIFF IN ERROR,

vs.

THE PHŒNIX MUTUAL LIFE-INSURANCE COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICTS OF MISSOURI.

FILED NOVEMBER 27, 1871.

1872.

183

Supreme Court United States
15th Wallace
573 - End.

SUPREME COURT OF THE UNITED STATES.

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THE PHŒNIX MUTUAL LIFE-INSURANCE COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICTS OF MISSOURI.

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1 MISSOURI DISTRICTS, *sct.:*

Pleas before the honorable circuit court of the United States for the districts of Missouri, at the April term thereof, A. D. 1871.

B. FRANK PARTRIDGE, PLAINTIFF,
vs.
THE PHŒNIX MUTUAL LIFE-INS. CO., DEFENDANT.
} Removed from circuit court St. Louis County.

Be it remembered that, heretofore, to wit, on the twenty-fifth day of September, A. D. 1869, there was filed in the clerk's office of the circuit court of the United States for the districts of Missouri, the following transcript of the record and proceedings in the above-entitled case in the circuit court of St. Louis County, Missouri, to wit:

Transcript.

STATE OF MISSOURI, *County of St. Louis, ss:*

Be it remembered that, heretofore, to wit, on the thirteenth day of August, A. D. 1868, there was filed in the office of the clerk of the circuit court of St. Louis County, a petition; which is in the words and figures following, to wit:

Petition.

In the circuit court of St. Louis Co., State of Missouri, October term, A. D. 1868.

B. FRANK PARTRIDGE
vs.
THE PHŒNIX MUTUAL LIFE-INSURANCE COMPANY.

2 The plaintiff above named respectfully avers and alleges that the defendant above named is a foreign corporation, duly incorporated by the laws of the State of Connecticut, and empowered to sue and be sued; and that said defendant, on or about the first day of January, A. D. 1867, was, and has since been, doing business in the city of St. Louis, and State of Missouri.

Plaintiff further avers and alleges that on or about the 2nd day of February, A. D. 1867, he, the said plaintiff, entered into an agreement by and with the said defendant, that by the terms of said agreement, this plaintiff promised and undertook within the State of Missouri, at the instance and request of said defendant, to procure, solicit, and cause policies of insurance upon the lives of individuals to be taken out and effected in the "Phœnix Mutual Life-Insurance Company," of Hartford, Connecticut, at the usual published rates of premium of said company; that, in consideration therefor, said defendant promised and undertook to give said plaintiff a certain interest in said policies of life-insurance, effected as aforesaid, to wit, to give said plaintiff twenty (20) per centum on the amount of all first premiums, and seven and one-half ($7\frac{1}{2}$) per centum on the amount of all renewal premiums that should be paid on all policies of insurance which said plaintiff should procure, solicit, and cause to be effected as aforesaid, in the Phœnix Mutual Life-Insurance Company, of Hartford, Connecticut, and that said defendant further promised and undertook to give this plaintiff seven and one-half ($7\frac{1}{2}$) per centum on the amount of all renewal premiums that should be thereafter paid on the following-described policies of life insurance, so long as the same should continue in force, to wit:

Policy number	16917,	dated	Feb'y	18th,	1866,	yearly	prem.,	$76	76
"	16977,	"	"	25th,	1866,	"	"	658	40
"	17842,	"	October	30th,	1866,	"	"	83	30
"	17844,	"	"	"	1866,	"	"	177	78
"	18188,	"	December	4th,	1866,	"	"	71	10
"	16701,	"	July	2nd,	1866,	"	"	28	60
"	16702,	"	"	2nd,	1866,	"	"	38	20

3

Policy number	16704	dated	July	2nd,	1866,	yearly	prem.,	$153	00
"	17368,	"	Sept.,	1st,	1866,	"	"	25	30
"	17905,	"	November	3d,	1866,	"	"	169	00

which last-mentioned policies above described and set forth had been theretofore issued by said defendants.

Plaintiff further avers and alleges that by the terms of said agreement it was further mutually agreed and understood, and said defendant promised, on or about the second day of February, A. D. 1867, that said plaintiff should be allowed to collect the premiums as the same should become due, on each and every policy of insurance which said plaintiff should cause to be taken out and effected as aforesaid, in the "Phœnix Mutual Life-Insurance Company," so long as said policies should continue in force; and that he should be allowed to collect the renewal premiums on each and every policy of insurance above described and set forth and theretofore issued by said defendant, as the same should become due, and so long as said policies should continue in force; and that said defendant should furnish and supply said plaintiff with its renewal receipts for renewal premiums, duly signed by said defendant, and enable and empower said plaintiff thereby to renew and continue in force both those policies of insurance which said plaintiff should cause to be effected as aforesaid, and those policies of insurance above described and set forth, as often as the premiums upon the same should become due, and should be paid to plaintiff. Plaintiff further avers and alleges that, pursuant to the aforesaid agreement, he, the said plaintiff, on or about the second (2nd) day of February, A. D 1867, began, within the State of Missouri, to procure, solicit, and cause policies of life-insurance to be taken out and effected in the Phœnix Mutual Life-Insurance Company, of Hartford, Connecticut, at the usual published rates of premium of said company, and continued so to do for the space of one year or thereabouts, and, until prevented from so doing by said defendant; that during the period of time last aforesaid the said plaintiff procured, solicited, and caused to be effected the following

4 policies of life insurance in the Phœnix Mutual Life-Insurance Company, of Hartford, Connecticut, at the usual published rates of premiums of said company, to wit:

Policy number	19218	dated	March	7th,	1867,	yearly	prem.,	191	40
"	19687	"	April	8th,	1867,	"	"	67	26
"	20537	"	May	29th,	1867,	"	"	87	48
"	20854	"	June	17th,	1867,	"	"	111	22
"	20875	"	"	19th,	1867,	"	"	526	50
"	21062	"	"	29th,	1867,	"	"	478	75
"	21240	"	July	12th,	1867,	"	"	80	94
"	21490	"	"	27th,	1867,	"	"	72	84
"	22679	"	October	5th,	1867,	"	"	100	14
"	22791	"	"	12th,	1867,	"	"	61	04
"	23220	"	November	9th,	1867,	"	"	64	40
"	23221	"	"	9th,	1867,	"	"	47	84

"	"	23242	"	"	11th,	1867,	"	"	182 68
"	"	23353	"	"	18th,	1867,	"	"	336 30
"	"	24169	"	December	31st,	1867,	"	"	290 20
"	"	24170	"	"	31st,	1867,	"	"	61 64
"	"	24190	"	"	31st,	1867,	"	"	364 20
"	"	24412	"	January	11th,	1868,	"	"	666 70
"	"	25223	"	February	2nd,	1868,	"	"	322 00
"	"	20029	"	April	29th,	1867,	"	"	91 01
"	"	20163	"	May	7th,	1867,	"	"	87 00
"	"	22084	"	August	31st,	1867,	"	"	95 75
"	"	24582	"	January	20th,	1868,	"	"	833 50
"	"	19047	"	Feb'y	23d,	1867,	"	"	160 55
"	"	19531	"	March	28th,	1867,	"	"	79 76
"	"	20394	"	May	20th,	1867,	"	"	88 83
"	"	20396	"	"	20th,	1867,	"	"	62 16

5

Policy number		20397,	dated	May	20th,	1867,	yearly	prem.,	107 67
"	"	20398,	"	"	20th,	1867,	"	"	100 17
"	"	20538,	"	"	29th,	1867,	"	"	66 78
"	"	20867,	"	June	18th,	1867,	"	"	76 88
"	"	22115,	"	September	2nd,	1867,	"	"	59 22
"	"	22116,	"	"	2nd,	1867,	"	"	38 44
"	"	23894,	"	December	17th,	1867,	"	"	31 69
"	"	23895,	"	"	17th,	1867,	"	"	33 12
"	"	24807,	"	January	31st,	1868,	"	"	32 70
"	"	24737,	"	"	27th,	1868,	"	"	52 39
"	"	24891,	"	February	5th,	1868,	"	"	56 24
"	"	18660,	"	January	22d,	1867,	"	"	178 20
"	"	18791,	"	February	2d,	1867,	"	"	41 20
"	"	18798,	"	"	4th,	1867,	"	"	157 50
"	"	19180,	"	March	6th,	1867,	"	"	65 20
"	"	18841,	"	February	6th,	1867,	"	"	153 00
"	"	18878,	"	"	11th,	1867,	"	"	126 50
"	"	19081,	"	"	25th,	1867,	"	"	59 75
"	"	19283,	"	March	13th,	1867,	"	"	65 08
"	"	19345,	"	"	16th,	1867,	"	"	182 00
"	"	20255,	"	May	13th,	1867,	"	"	113 30
"	"	21254,	"	July	13th,	1867,	"	"	143 00
"	"	21514,	"	"	29th,	1867,	"	"	331 25
"	"	20937,	"	June	24th,	1867,	"	"	69 90
"	"	21681,	"	August	6th,	1867,	"	"	46 60
"	"	21713,	"	"	9th,	1867,	"	"	114 00
"	"	21758,	"	"	12th,	1867,	"	"	315 00
"	"	21781,	"	"	13th,	1867,	"	"	298 00
"	"	21938,	"	"	23d,	1867,	"	"	119 50

6

Policy number		22141,	dated	September	4th,	1867,	yearly	prem.,	153 00
"	"	22142,	"	"	4th,	1867,	"	"	206 00
"	"	22502,	"	"	25th,	1867,	"	"	221 80
"	"	22678,	"	October	5th,	1867,	"	"	512 00
"	"	22741,	"	"	9th,	1867,	"	"	46 60
"	"	23009,	"	"	26th,	1867,	"	"	430 00
"	"	23028,	"	"	29th,	1867,	"	"	157 50
"	"	23149,	"	November	6th,	1867,	"	"	49 20
"	"	23219,	"	"	9th,	1867,	"	"	107 60

"	"	23408,	"	"	20th,	1867,	"	"	191 00
"	"	23605,	"	December	3d,	1867,	"	"	93 00
"	"	24252,	"	"	31st,	1867,	"	"	412 00
"	"	24253,	"	"	31st,	1867,	"	"	662 50
"	"	24408,	"	January	11th,	1868,	"	"	225 00
"	"	24473,	"	"	15th,	1868,	"	"	191 00
"	"	24552,	"	"	18th,	1868,	"	"	245 00
"	"	24661,	"	"	23d,	1868,	"	"	148 50
"	"	24772,	"	"	29th,	1868,	"	"	206 00
"	"	24715,	"	"	25th,	1868,	"	"	538 00
"	"	25030,	"	February	10th,	1868,	"	"	143 00
"	"	25049,	"	"	12th,	1868,	"	"	245 00
"	"	25090,	"	"	14th,	1868,	"	"	189 00
"	"	25115,	"	"	17th,	1868,	"	"	256 00

All of which policies of insurance last described, and all of which policies of insurance heretofore set forth and described, this plaintiff avers and alleges to be still in force.

And this plaintiff further avers that in all other respects he has kept and performed the conditions of the aforesaid agreement to be by him kept and performed; but this plaintiff avers and alleges that said defendant, on the contrary, has failed to keep the conditions of
7 the aforesaid agreement to be by it kept and performed, in this, that, on or about the 15th day of February, A. D. 1868, and ever since that time, said defendant refused and has refused, and does still refuse, and, by the unlawful act of said defendant, has prevented said plaintiff, within the State of Missouri, without any just cause or provocation for so doing, from procuring, soliciting, or causing policies of insurance upon the lives of individuals to be taken out and effected in the "Phœnix Mutual Life-Insurance Company" of Hartford, Connecticut, at the usual published rates of premiums of said company; that on or about the date last aforesaid, and ever since that time, said defendant refused, and has refused, and does still refuse to pay this plaintiff any portion or per centum of the amount of premiums which have been paid to defendant since the 15th day of February, A. D. 1868, on any of the policies of insurance hereinbefore set forth in this petition, and particularly described, and refused, and has refused, and does still refuse to pay this plaintiff the amount of the present value of this plaintiff's interest in said policies hereinbefore described, although frequently requested so to do.

Plaintiff further avers and states that, since the fifteenth day of February, A. D. 1868, and up to the present date, there have fallen due on said policies of insurance hereinbefore described and set forth premiums to the full amount of four thousand three hundred thirty-eight & $\frac{8}{100}$ dollars, which last-mentioned sum so falling due on said policies of insurance said defendant, by its unlawful acts, and in violation of its said agreement, has prevented this plaintiff from collecting; and this plaintiff avers and alleges that said defendant has in fact itself, through its agent, collected the whole of said sum of four thousand three hundred thirty-eight $\frac{8}{100}$ dollars so falling due as aforesaid on said policies of insurance since the 15th day of February, A. D. 1868, and applied the same to its (the defendant's) own use; that said defendant, since the 15th day of February, A. D. 1868, and up to the present time has refused, and does still refuse, to furnish this plaintiff with its
8 renewal receipts for renewal premiums, duly signed by said defendant, or with any receipt for premiums whatever, and has thereby prevented and disabled this plaintiff from renewing and

continuing in force any of the policies of insurance hereinbefore set forth and described as often as the premiums upon the same should become due and payable, and has prevented the holders of said policies from paying any portion or per centum of the premiums upon said policies of insurance to this plaintiff.

Plaintiff further avers and alleges that the yearly premiums upon the policies of insurance hereinbefore described and set forth would and do, in fact, amount to a large sum annually, to wit, to the full sum of fifteen thousand nine hundred fifty-six $\frac{51}{100}$ dollars; that the present value of this plaintiff's interest in said policies of insurance, and in the premiums to be realized therefrom, would and does amount to the full sum of five thousand dollars; and that the said sum has become wholly lost and of no avail to this plaintiff by reason of the aforesaid unlawful acts of said defendant.

Wherefore he demands judgment against defendant in the sum of five thousand dollars and the costs of this action.

LA DUE & BIRGE,
Attorneys for Petitioner.

Whereupon a summons issued, directed to the sheriff of St. Louis County, in the words and figures following, to wit:

Summons.

THE STATE OF MISSOURI,
County of St. Louis, ss:

To the sheriff of St. Louis County, greeting:

We command you to summon The Phœnix Mutual Life-Insurance Company to appear before the judges of our circuit court on the first day of the next term thereof, to be held in the city of St. Louis, within and for the county of St. Louis, on the first Monday of October next, then and there to answer the complaint of B. Frank Partridge as set forth in the annexed petition, and have you then and there this writ.

Witness John Lewis, clerk of our said court, with the seal thereof hereto affixed, at office in the city of St. Louis this 13th day of August, in the year of our Lord eighteen hundred and sixty-eight.

[SEAL.] JNO. LEWIS, *Clerk.*

Upon back of which summons the sheriff made return as follows, to wit:

Sheriff's return.

Executed this writ in the county of St. Louis on the 14th day of August, 1868, by delivering a copy of the writ and petition and a copy of account attached, as furnished by the clerk to E. S. Biden, who was in charge of the business office of the Phœnix Mutual Life-Insurance Company at the time of said service. The president and other chief officer' cannot be found in my county.

JOHN McNEIL, *Sheriff.*

And, on the sixth day of October, A. D. 1868, the following answer was filed, to wit:

Def't's answer.

In the St. Louis County circuit court, October term, A. D. 1868.

B. FRANK PARTRIDGE
vs.
THE PHŒNIX MUTUAL LIFE-INSURANCE Company, defendant.

The defendant, for answer to the plaintiff's petition filed herein, denies that, on or about the second day of February, A. D. 1867, or at any other time, the defendant entered into any contract or agreement with plaintiff, as alleged in his said petition; but avers that, for about the space of time alleged in said petition, and pending the appointment of a general agent by the defendant in the State of Missouri, the
10 plaintiff was permitted to solicit and cause policies of life-insurance to be taken out in the defendant's company; and that the plaintiff was paid for his said services the sum of 20 per cent. on the amount of all first premiums, and 7½ per cent. on the amount of all renewal premiums collected by him; which said amount the plaintiff was allowed to retain and did retain from the amounts collected by him, as his commissions. And the defendant admits that so long as the plaintiff continued so to be permitted to solicit policies of life-insurance to be taken out in defendant's company he was permitted to collect the renewal premiums on the policies of life-insurance described in his said petition as having been issued before the date of his pretended contract with the defendant, and to retain for his services in collecting said renewal premiums 7½ per cent. of the amount collected; but the defendant denies that, on or about the second day of February, A. D. 1868, or at any other time, it agreed to give the plaintiff 7½ per centum on the amount of all renewal premiums that should be thereafter paid on the policies described in plaintiff's petition as theretofore issued so long as the same should continue in force, or for any greater length of time than the plaintiff should continue to be employed by the defendant to solicit and cause to be taken out policies of life-insurance.

Defendant denies that it ever entered into any contract, or that it was ever mutually understood or agreed between plaintiff and defendant that defendant should allow the plaintiff to collect the premiums on each and every policy of life-insurance which said plaintiff should cause to be taken and effected in defendant's company so long as the same should continue in force, or any longer than the plaintiff should continue to be permitted to solicit policies of life-insurance for & in behalf of the defendant.

The defendant denies that it ever agreed to furnish and supply plaintiff with the renewal receipts for renewal premiums, whereby to enable plaintiff to renew and continue in force either the policies of
11 life-insurance which he himself had effected or those which had been issued before he began to be permitted to solicit policies of life-insurance for & in behalf of the defendant as often as the premiums upon the same should become due, or to furnish & supply plaintiff with said renewal receipts at any time after he should cease to be in defendant's employ, to solicit and cause to be taken out policies of life-insurance in defendant's company.

Defendant denies that there was ever any contract or agreement, express or implied, between plaintiff and defendant, whereby defendant was bound to furnish plaintiff renewal receipts and permit him to collect the renewal premiums on the policies described in his said petition so long as the same should continue in force, or whereby the plaintiff

acquired any interest in the policies of life-insurance effected by him in defendant's company beyond the amount of his commissions during the time the premiums were collected by him. Defendant denies that any portion or per centum of the amount of premiums which have been paid to defendant since the 15th day of February, A. D. 1868, on the policies of life-insurance set forth in plaintiff's petition is due to the plaintiff, as alleged in his said petition, or that the plaintiff has any right or interest whatever in said policies of insurance. Defendant denies that the sum of four thousand three hundred and thirty-eight dollars and thirty-eight cents has fallen due and been collected by defendant's agents on the policies of life-insurance described in plaintiff's petition, since the 15th day of February, 1868, or that the yearly value of said policies is fifteen thousand dollars; or that the plaintiff has any right to demand any portion as per centum of said sums. And the defendant denies that the plaintiff's interest in said yearly value is five thousand dollars, ($5,000,) or any other sum whatever; or that it is indebted to the plaintiff in the sum of five thousand dollars, ($5,000,) or in any other sum. The defendant avers that the plaintiff was only permitted to solicit and procure policies of life-insurance for & in behalf of
12 defendant during the pleasure of this defendant; and this defendant never entered into any contract, express or implied, to continue plaintiff in its services for any certain time or longer than the interests of this defendant could be subserved by his said services; that plaintiff having failed to make his returns, having misapplied the defendant's money, and having in other respects aroused the suspicion and incurred the displeasure of this defendant, was, on or about the 15th day of February, 1868, dismissed from defendant's employ; that plaintiff has been fully paid for all services which he has rendered this defendant, but that, after deducting all commissions due plaintiff, there still remains due to this defendant, of the mon*ies* belonging to this defendant collected by the plaintiff, the full sum of two thousand three hundred and eighty-six dollars and seventy-five cents, ($2,386.75,) the particulars of which indebtedness will more fully appear by reference to the counter-claim hereinafter set forth and pleaded.

Said defendant, as a further defence, and by way of counter-claim and cause of action against said plaintiff, states, that at the day of instituting this suit by the plaintiff against the defendant, he, the said plaintiff, was indebted to the said defendant in the full sum and balance of twenty-three hundred and eighty-six dollars and seventy-five cents, ($2,386.75,) an amount of mon*ies* collected by said plaintiff for said defendant and belonging to it while said plaintiff was acting as agent and collector of said defendant, which said sum plaintiff has converted to his own use without the consent of said defendant, and which said sum still remains due and unpaid, although often demanded of said plaintiff by the defendant. The particulars of said indebtedness will be more readily seen by reference to an account herewith filed *filed* and marked Exhibit "A." Wherefore, and by reason of the premises aforesaid, said defendant prays judgment against said plaintiff for said sum of two thousand three hundred and eighty-six dollars and seventy-five cents,
13 ($2,386.75,) in this behalf expended; and for his costs, and for all other relief.

FRANK ENO, WITH
CLINE, JAMIESON & DAY,
Attorneys for Defendant.

Account, marked Exhibit "A."

The account filed with said answer, marked Exhibit "A," and referred to above, is as follows, to wit:

EXHIBIT "A."

Phœnix Mutual Life-Insurance Co. in account with Benj. F. Partridge.

DR.

To premium and renewals on policies received:

No. of policy.	Insured party.	Am't of premium.	Interest.	How paid.	
				Cash.	Note.
23353	Jno. H. Delahay	336 30	10 08	168 30	168
24169	Theo. F. Prewitt	290 20	8 70	145 20	145
24170	Cha's D. Moody	61 64	1 80	31 64	30
24190	Albert Fisher	364 20	10 92	182 20	182
24252	Jno. M. Platt	412 00	12 36	206	206
24253	W'm N. Switzer	662 50	19 86	331 50	331
24408	Cha's W. Townsley	225	6 72	113	112
24412	Amanda Kuhn	666 70	19 98	333 70	333
24473	Melissa M. Jewall	191	5 70	96	95
24582	Cha's L. Freeman	833 50	24 96	417 50	416
24661	Geo. W. Rucker	148 50	4 44	74 50	74
24715	Derrick A. January	538	16 14	269	269
24737	Jno. Lay	52 39	1 56	26 39	26
24772	Tho's M. Hackett	206	6 18	103	103
24808	Elizabeth O'Brien	30 35	90	15 35	15
24897	Richard C. Plaisted	56 24	1 68	28 24	28
14 25030	Robert Dickey	143	4 26	72	71
25049	Rob't M. Henderson	245	7 32	123	122
25090	Angelique Ribot	189	5 64	95	94
25093	Adolph Cohen	322	9 66	161	161
		5,973 52			
	RENEWALS.				
16709	Elizabeth Mueller's note	19 10			
18660	C. N. H. Hausman	178 20	10 68	89 20	89
18791	Hiram C. Brown	41 20	2 40	21 20	20
18798	Jas. K. Miller	157 50	9 36	79 50	78
18878	Frank Meacham	126 50	7 56	63 50	63
		$6,496 02	208 86	3,245 92	3,231 00
		208 86			
		6,704 88			
		4,318 13			
		$2,386 75	Balance	due co.	

CR.

By commissions and charges:

		Policies not taken and policies not received.	
		No.	Premium.
By revenue stamps	12 25	22552	55 40
" postage	2 00	23408	191
" commission, 20 % on $5,973.52	1,194 70	24167	44 40
" " 7½ " " 522.50	39 18	24168	45 60
" premium notes herewith	3,070 00	24254	57 62
		24314	37 22
		24315	38 44
		24474	153 36
		24517	69 46
		24552	245
		24807	32 70
		24845	286
		24846	78 22
		24847	41 97
		25069	182
		25517	69 46
	$4,318 13		1,727 85

15 And on the 21st day of October, A. D. 1868, the following motion to strike out portions of answer was filed, to wit:

Motion to strike out portions of answer.

In the St. Louis County circuit court, Oct. T., 1868.

B. F. PARTRIDGE
vs.
THE PHŒNIX MUTUAL LIFE-INSURANCE COMPANY, defendant.

And now comes the plaintiff in the above-entitled cause, by Birge & Thayer, his attorneys, and moves the court to strike out portions of the defendant's answer filed herein as follows: All that portion in the words and figures following beginning on the 14th line of the first page, to wit—

"But avers that for about the space of time alleged in said petition and pending the appointment of a general agent by the defendant in the State of Missouri, the plaintiff was permitted to solicit and cause policies of life-insurance to be taken out in the defendant's company, and that the plaintiff was paid for his said services the sum of 20 per cent. on the amount of all first premiums, and 7½ per cent. on the amount of all renewal premiums collected by him, which said amount the plaintiff was allowed to retain and did retain from the amounts collected by him as his commissions. And the defendant admits that so long as plaintiff continued so to be permitted to solicit policies of life-insurance to be taken out in defendant's company, he was permitted to collect the renewal premiums on the policies of life-insurance described in his said petition as having been issued before the date of his pretended contract with the defendant and to retain for his services in collecting said renewal premiums 7½ per cent. of the amount collected. But defendant denies that on or about the second day of February, A. D. 1868, or at any other time it agreed to give the plaintiff 7½ per cent. on the amount of all renewal premiums that should be thereafter paid on the policies described in plaintiff's petition as theretofore issued so long as the same should continue in force, or for any greater
16 length of time than the plaintiff should continue to be employed by defendants to solicit and cause to be taken out policies of life-insurance."

Also all that portion of said answer in the words and figures following, commencing on the 13th line of the third page of said petition, to wit:

"Or any longer than the plaintiff should continue to be permitted to solicit policies of life-insurance for and in behalf of the defendant. The defendant denies that it was agreed to furnish and supply plaintiff with the renewal receipts for renewal premiums, whereby to enable plaintiff to renew and continue in force either the policies of life-insurance which he himself had effected, or those which had been issued before he began to be permitted to solicit policies of life-insurance for and in behalf of the defendant as often as the premiums upon the same should become due, or to furnish and supply plaintiff with said renewal receipts at any time after he should cease to be in defendant's employ to solicit and cause to be taken out policies of life-insurance in defendant's company."

Also that portion of said answer in the words and figures following, commencing on the 4th page at the 19th line, to wit:

"Or whereby the plaintiff acquired any interest in the policies of life-insurance effected by him in defendant's company beyond the amount of his commissions during the time the premiums were collected by him."

Also that portion of said answer in the words and figures following, commencing on the 26th line of the 5th page, to wit:

"The defendant avers that the plaintiff was only permitted to solicit and procure policies of life-insurance for and in behalf of defendant during the pleasure of this defendant, and that the defendant never entered into any contract, express or implied, to continue plaintiff in its service for any certain time, or longer than the interests of this defendant could be subserved by his said services. The plaintiff having
17 failed to make his returns, having misapplied the defendant's money, and having in other respects aroused the suspicion and incurred the displeasure of defendants, was, on or about the 15th day of February, 1868, dismissed from defendant's employ. That plaintiff has been fully paid for all services which he has rendered this defendant, but that after deducting all commissions due plaintiff there still remains due to this defendant of the monies belonging to this defendant collected by the plaintiff, the full sum of two thousand three hundred and eighty-six dollars and seventy-five cents, ($2,386.75,) the particulars of which indebtedness will more fully appear by reference to the counter-claim hereinafter set forth and pleaded."

For the reasons:

1st. That the same is irrelevant.

2nd. That it is not responsive to the allegations of the petition.

3d. That it is argumentative.

4th. That it is neither a denial of the allegation of the petition nor new matter.

BIRGE & THAYER.
Pl'ff's Att'ys.

And afterwards, at a general term of the circuit court of St. Louis County, being the October term, A. D. 1868, the following proceedings were had in said cause, to wit:

Motion to strike out portions of answer overruled.

WEDNESDAY, *November* 25, 1868.

B. FRANK PARTRIDGE
vs.
THE PHŒNIX MUTUAL LIFE-INSURANCE COMPANY.

The motion to strike out parts of answer being submitted to the court, and the court being fully advised of and concerning the premises doth order that the same be overruled at the costs of the plaintiff, and that execution issue therefor.

18 And on the 28th day of November, A. D. 1868, the plaintiff, by leave of court, filed the following amended reply:

Amended reply.

In the circuit court for St. Louis County, Mo.

B. FRANK PARTRIDGE
vs.
THE PHŒNIX MUTUAL LIFE-INSURANCE COMpany. } Reply as amended.

And now comes the plaintiff in the above-entitled action, by his attorneys, and for an amended reply to so much of defendant's answer herein as sets up new matter, says that he denies that plaintiff, while in the employ of said defendant, failed to make correct & regular returns to said defendant; denies that he ever misapplied in any manner, any monies belonging to said defendant, and denies that his conduct or actions at any time while so employed by said defendant were calculated to arouse the suspicion, or that they were such as would justify the displeasure of said defendants; and as to whether said plaintiff did in any respect arrouse the suspicion and incur the displeasure of said defendants, as in said answer alleged, plaintiff has no knowledge or information sufficient to form a belief, and therefore denies the same.

Plaintiff denies that he has been fully paid for all services rendered by him to said defendant, and denies that after deducting all commission due said plaintiff, there still remains due and belonging to said defendant of the monies collected by said plaintiff the sum of two thousand three hundred & eighty-six and $\frac{75}{100}$ dollars, or any other sum whatever.

Plaintiff further denies that at the day of instituting this suit, he, said plaintiff, was indebted to said defendant in the sum of two thousand three hundred and eighty-six and $\frac{75}{100}$ dollars, or in any sum whatever on account of premiums collected by said plaintiff and belonging to said defendant as alleged in said answer. And plaintiff denies that he has converted to his own use without the consent of said defendant, said sum of two thousand three hundred and eighty-six and $\frac{75}{100}$ dollars, or any other sum whatever belonging to said defendant as in said answer alleged.

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And plaintiff denies that said sum of two thousand three hundred and eighty-six and $\frac{75}{100}$ dollars, or any other sum of money whatever, is now due and unpaid from said plaintiff to said defendant.

Wherefore plaintiff asks judgment as prayed for in the petition herein.

BIRGE & THAYER,
Pl'ff's Att'ys.

And at the April term A. D. 1869, being at a special term of said court the following further proceedings were had in said cause, to wit:

Cause removed to U. S. cir. court.

WEDNESDAY, *May* 5, 1869.

B. FRANK PARTRIDGE
vs.
THE PHŒNIX MUTUAL LIFE-INSURANCE COMpany. }

Now, at this day comes the defendant by its agent, L. B. Pierce, and

files a petition, duly verified by affidavit, for the removal of this cause to the United States circuit court for the districts of Missouri, and the court having duly heard and considered the same doth order that, on the defendant's filing a good and sufficient bond according to law, to be approved by the court, in the penal sum of one thousand dollars, *that* this cause be removed to the circuit court of the United States for the eastern districts of Missouri. And it is further ordered by the court, that the clerk of this court certify to the circuit court of the United States for the districts of Missouri, a complete transcript of the record and proceedings in this cause. Bond filed and approved.

Which petition for removal and bond are in the words and figures following, to wit.

20 *Petition for removal to U. S. circuit court.*

In the St. Louis circuit court, April term, 1869.

STATE OF MISSOURI, *County of St. Louis, ss :*

B. FRANK PARTRIDGE
vs
THE PHŒNIX MUTUAL LIFE-INSURANCE COMpany.

Now, on this day comes Lewis B. Pierce, the agent, having specially in charge the affairs and business of said defendant in and for the State of Missouri, &c., who being duly sworn, upon his oath deposeth and states that the above-named plaintiff is now and was at the institution of this suit a resident and citizen of this State; that the above-named defendant is a foreign corporation, duly created and organized under and by virtue of the laws of the State of Connecticut, and that it is a non-resident of this State, and is a resident and citizen of the State of Connecticutt; that the amount in controversy exceeds the sum of five hundred dollars, and that said corporation cannot have a fair trial in the above cause in this court owing to the prejudice against foreign corporations in the minds of jurors and the local courts of the said State, and that he has reason to believe and does believe that, from prejudice and local influence, said defendant will not be able to obtain justice; wherefore it asks to have the records of this cause changed, and the cause transferred to the United States circuit court for the districts of Missouri, and he further states that this change of venue is not made for the purpose of delay, but in order that justice may be done, and that the reasons for said change have been discovered by said defendant since the filing of its answer herein.

L. B. PIERCE.

Sworn to and subscribed before me this 5th day of May, 1869.
J. LEWIS, *Clk.*

Bond.

Know all men by these presents that we, John Riggen, E. B. Byington, Louis B. Pierce, & George W. Cline, are held and firmly bound unto B. Frank Partridge in the just and full sum of one thousand
21 dollars, for the payment whereof well and truly to be made unto the said obligee, their executors, administrators, and assigns, we severally bind ourselves, our heirs, executors, & administrators firmly

by these presents, sealed with our seals and dated at St. Louis this the 5th day of May, 1869.

The condition of this obligation is that, whereas the above-named obligee has heretofore instituted suit in the St. Louis circuit court for the county of St. Louis and State of Missouri, against the Phœnix Mutual Life-Insurance Company; and whereas the said Insurance Company has filed its petition in said court for the removal of said cause to the circuit court of the United States for the districts of Missouri:

Now, if the said Insurance Company shall, on or before the first day of the next term of said circuit court of the United States, file therein copies of the process & pleadings in said cause against it, and shall duly enter its appearance in said last-named court at the time aforesaid, then this obligation shall be void; otherwise to remain in full force and effect.

JOHN RIGGEN. [SEAL.]
EDWIN B. BYINGTON. [SEAL.]
L. B. PIERCE. [SEAL.]
GEO. W. CLINE. [SEAL.]

Approved in open court May 5, '69.

J. LEWIS, *Clk.*

Costs of suit, $27.45; transcript, $13.30—total costs, $40.75. Paid by def't.

Certificate.

STATE OF MISSOURI, *County of St. Louis, ss:*

I, John Lewis, clerk of the circuit court within and for the county of St. Louis, hereby certify the foregoing to be a full, true, and complete transcript of the record and proceedings had in the above-entitled cause as fully as the same remains on file in my office, and the costs of suit.

In testimony whereof I hereto set my hand and affix the seal of said court at office in the city of St. Louis this 26th day of August, A. D. 1869.

[SEAL.] JOHN LEWIS, *Clerk.*

22 And afterwards, at a regular stated term of the circuit court of the United States for the districts of Missouri, begun and held at the city of St. Louis on the first Monday of October, A. D. 1869, the following further proceedings were had in this case on Saturday, October 9, 1869, to wit:

Amos M. Thayer enters appearance as attorney for plaintiff.

Removed from circuit court of St. Louis County.

B. FRANK PARTRIDGE, PLAINTIFF,
vs.
THE PHŒNIX MUTUAL LIFE-INSURANCE COMPANY, defendant.

This day come Messrs. La Due and Birge, and ask for leave to withdraw their names as the attorneys of record for the plaintiff in this case, which is allowed. Thereupon comes Amos M. Thayer, esquire, and enters appearance as attorney for said plaintiff herein.

And afterwards, at a regular stated term of the said circuit court, to wit, at the April term, A. D. 1870, the following further proceedings were had in this case, on Monday, April 4, 1870, to wit:

Case continued.

Removed from circuit court of St. Louis County.

B. FRANK PARTRIDGE, PLAINTIFF,
vs.
THE PHŒNIX MUTUAL LIFE-INSURANCE COMPANY, defendant.

This day came the parties, by attorneys, and by consent it is ordered that this case be now continued until the next term of this court.

And afterwards, at a regular stated term of the said circuit court, to wit, at the October term, A. D. 1870, the following further proceedings were had in this case, on Friday, October 7, 1870, to wit:

Amended answer filed.

Removed from circuit court of St. Louis County.

B. FRANK PARTRIDGE, PLAINTIFF,
vs.
THE PHŒNIX MUTUAL LIFE-INSURANCE COMPANY, defendant.

23 This day comes the defendant, by attorney, and with the leave of court, files its amended answer to the petition of plaintiff herein against it.

And the amended answer, filed as aforesaid, is in the words and figures following, to wit:

Amended ans.

In the circuit court of the United States for the districts of Missouri.
October term, A. D. 1871.

B. FRANK PARTRIDGE, PLAINTIFF,
vs.
THE PHŒNIX MUTUAL LIFE-INSURANCE COMPANY, defendant.

And now comes the defendant, and leave of court first being had and obtained, files this its amended answer to plaintiff's petition.

Defendant denies that on or about the second day of February, A. D. 1867, or at any other time, defendant entered into any contract or agreement with plaintiff, as alleged in his said petition, but avers that for about the space of time alleged in said petition, and pending the appointment of a general agent by the defendant, in the State of Missouri, the plaintiff was permitted to solicit and cause policies of life-insurance to be taken out in the defendant's company, and that the plaintiff was paid for his said services the sum of 20 per cent. on the amount of all first premiums, and 7½ per cent. on the amount of all renewal premiums col-

lected by him; which said amount the plaintiff was allowed to retain, and did retain from the amounts collected by him, as his commissions. And defendant admits that, so long as the plaintiff continued so to be permitted to solicit policies of life-insurance to be taken out in defendant's company, he was permitted to collect the renewal premiums on the policies of life-insurance described in his said petition as having been issued before the date of this pretended contract with the
24 defendant, and to retain for his services in collecting said renewal premiums, 7½ per cent. of the amount collected; but the defendant denies that on or about the second day of February, 1867, or at any other time, it agreed to give the plaintiff 7½ per centum on the amount of all renewal premiums that should be thereafter paid on the policies described in plaintiff's petition as, "theretofore issued," so long as the same should continue in force, or for any greater length of time than the plaintiff should continue to be employed by defendant, to solicit and cause to be taken out policies of life-insurance in defendant's company.

Defendant denies that it ever entered into any contract, or that it was ever mutually understood or agreed between plaintiff and defendant that defendant should allow the plaintiff to collect the premiums on each and every policy of life-insurance which said plaintiff should cause to be taken and effected in defendant's company, so long as the same should continue in force, or any longer than the plaintiff should continue to be permitted to solicit policies of life insurance for & in behalf of defendant.

The defendant denies that it ever agreed to furnish and supply plaintiff with the renewal receipts for renewal premiums, whereby to enable plaintiff to renew and continue in force, either the policies of life-insurance which he himself had effected, or those which had been issued before he began to be permitted to solicit policies of life-insurance for and in behalf of defendant, as often as the premiums upon the same should become due, or to furnish and supply plaintiff with said renewal receipts, at any time after he should cease to be in defendant's employ, to solicit and cause to be taken out policies of life-insurance in defendant's company.

Defendant denies that there was ever any contract or agreement, express or implied, between plaintiff and defendant, whereby defendant was bound to furnish plaintiff renewal receipts and permit him to collect the renewal premiums on the policies described in his said petition, so long as the same should continue in force, or whereby the plaintiff acquired any interest in the policies of life-insurance ef-
25 fected by him in defendant's company, beyond the amount of his commissions during the time the premiums were collected by him.

Defendant denies that any portion or per centum of the amount of premiums which have been paid to defendant since the 15th day of February, 1868, on the policies of life-insurance set forth and described in plaintiff's petition, is due to the plaintiff, as alleged in his said petition, or that the plaintiff has any right or interest whatever in said policies of insurance.

Defendant denies that said policies of life-insurance mentioned and described in plaintiff's petition are still in force, as alleged, but said defendant, on the contrary, alleges the fact to be that each and every one of said policies of life-insurance mentioned and described in plaintiff's petition, and described in a schedule hereto annexed, marked Exhibit B, have ceased and determined and are utterly worthless and of no value whatever.

Defendant denies that the sum of four thousand three hundred and thirty-eight $\frac{38}{100}$ dollars has fallen due and been collected by defendant's agents on the policies of life-insurance described in plaintiff's petition, since the 15th day of February, 1868, or that the yearly value of said policies is fifteen thousand dollars, or that the plaintiff has any right to demand any portion or per centum of said sums; and the defendant denies that the plaintiff's interest in said yearly value is five thousand dollars, ($5,000,) or any other sum, or that he has any interest whatever in said yearly value, or that the defendant is *is* indebted to the plaintiff in the sum of five thousand dollars, or in any other sum.

The defendant avers that the plaintiff was only permitted to solicit and procure policies of life-insurance for and in behalf of defendant during the pleasure of this defendant, and that this defendant never entened into any contract, express or implied, to continue plaintiff in its service for any certain time or longer than the interests of this defendant could be subserved by his said services.

Defendant denies that it has prevented plaintiff from procuring,
26 soliciting, or causing policies of insurance on the lives of individuals to be taken out and effected in defendant's company, by any "unlawful act," or "without just cause or provocation for so doing," as plaintiff alleges, but, on the contrary, avers that the plaintiff having failed to make his proper returns, having misapplied the defendant's money, and having in other respects occasioned the suspicion and incurred the displeasure of this defendant, was on or about the 15th day of February, 1868, dismissed from defendant's employ, for just and reasonable cause; that plaintiff has been fully paid for all services which he has rendered this defendant; but that, after deducting all commissions due plaintiff, there still remains due to this defendant, of the monies belonging to this defendant collected by the plaintiff, the full sum of two thousand three hundred and eighty-six $\frac{75}{100}$ dollars, the particulars of which indebtedness will more fully appear by reference to the counter-claim hereinafter set forth and pleaded.

Said deponent, as a further defence, and by way of counter-claim and cause of action against said plaintiff, states that, on the day of instituting this suit by the plaintiff against the defendant, he, the said plaintiff, was indebted to the said defendant in the full sum and balance of twenty-three hundred and eighty-six $\frac{75}{100}$ dollars; an amount of monies collected by said plaintiff for said defendant, and belonging to it, while said plaintiff was acting as agent and collector of said defendant, which said sum plaintiff has converted to his own use without the consent of said defendant, and which said sum still remains due and unpaid, although often demanded of said plaintiff by the defendant. The particulars of said indebtedness will be more readily seen by reference to an account thereof, marked "Exhibit A," filed with the original answer in this case, & which said "Exhibit A" is a part of the record in this case. Wherefore, and by reason of the premises aforesaid, said defendant prays judgment against said plaintiff for said sum of twenty-three hun-
27 dred eighty-six $\frac{75}{100}$ dollars in this behalf expended, and for his costs, and for all other relief.

FRANK ENO, WITH
CLINE, JAMIESON & DAY,
Attorneys for Defendant.

"Exhibit B," referred to in the foregoing amended answer, is in the following words and figures, to wit:

"Exhibit B," of defendant's amended ans.

"Exhibit B," defendant's amended answer.

Policy number	17842,	dated	October 30,	'66,	76	76.	Paid up policy.
" "	16702,	"	July 2,	1866,	83	30.	
" "	19218,	"	March 7,	1867,	191	40.	
" "	20537,	"	May 29,	1867,	87	48.	
" "	21062,	"	June 29,	1867,	478	75.	Paid up policy.
" "	22679,	"	Oct. 5,	1867,	100	14.	
" "	23243,	"	Nov. 11,	"	182	68.	
" "	23353,	"	" 18,	"	336	30.	
" "	24170,	"	Dec. 31,	1867,	61	44.	
" "	24412,	"	Jan. 11,	1868,	666	70.	
" "	20029,	"	April 29,	1867,	91	01.	
" "	22084,	"	Aug. 31st,	1867,	95	75.	
" "	19047,	"	Feb. 23d,	1867,	160	55.	
" "	19531,	"	March 28,	1867,	79	76.	
" "	20394,	"	May 20,	1867,	88	83.	
" "	20396,	"	" "	"	62	16.	
" "	20397,	"	" "	"	107	67.	
" "	20398,	"	" "	"	100	17.	
" "	20538,	"	" 29,	"	66	78.	
" "	22115,	"	Sept. 2,	1867,	59	22.	
" "	22116,	"	" "	"	38	44.	

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Policy No.	23894,	dated	Dec. 17,	1867,	31	69.	
" "	24807,	"	Jan. 31,	1868,	32	70.	Not entered in
" "	24897,	"	Feb. 5,	1868,	56	24.	register.
" "	18791,	"	" 2,	1867,	41	20.	
" "	18798,	"	" 4,	"	157	50.	
" "	19180,	"	March 6,	1867,	65	20.	
" "	18841,	"	Feb. 6,		153	00.	
" "	19081.	"	Feb. 25,	1867,	59	75.	
" "	19345,	"	March 16,	"	182	00.	
" "	20255,	"	May 13,	"	113	00.	
" "	21254,	"	July 13,	"	143	00.	
" "	20937,	"	June 24,	"	69	90.	
" "	21681,	"	Aug. 6,	"	46	60.	
" "	21758,	"	" 12,	"	315	00.	
" "	21781,	"	" 13,	"	298	00.	
" "	21938,	"	" 23,	"	119	00.	
" "	22141,	"	Sept. 4,	1867,	153	00.	
" "	22142,	"	" 4,	"	206	00.	
" "	22502,	"	" 25,	"	221	00.	Deceased.
" "	22678,	"	Oct. 5,	"	512	00.	
" "	23009,	"	" 26,	"	430	00.	Deceased.
" "	23028,	"	" 29,	"	157	50.	
" "	23149,	"	Nov. 6,	"	49	20.	
" "	23408,	"	" 20,	"	191	00.	
" "	23605,	"	Dec. 3,	"	93	00.	
" "	24252,	"	" 31,	"	412	00.	
" "	24473,	"	Jan. 15,	1868,	191	00.	
" "	24552,	"	" 18,	"	245	00.	
" "	24661,	"	" 23,	"	148	50.	

"	"	24772,	"	" 29,	"	206 00.
"	"	25030,	"	Feb. 10,	"	143 00.
"	"	25090,	"	" 14,	"	189 00.
"	"	25115,	"	" 17,	"	256 00.

29 And afterwards, at said last-mentioned term of said circuit court, the following further proceedings were had in this case on Saturday, October 8th, A. D. 1870, to wit:

The motion to strike out part of def't's amended answer filed.

Removed from circuit court of St. Louis County.

B. F. PARTRIDGE, PLAINTIFF,
ag'st
THE PHŒNIX MUTUAL LIFE-INSURANCE COMpany, defendant.

This day comes the plaintiff, by attorney, and files his motion to strike out part of the amended answer heretofore filed by defendant herein.

And the motion to strike out part of defendant's amended answer is in the following words and figures, to wit:

The motion to strike out def't's amended answer in part.

In the circuit court of the United States for the districts of Missouri, October term, 1870.

B. F. PARTRIDGE, PLAINTIFF,
vs.
THE PHŒNIX MUTUAL LIFE-INSURANCE COMpany, defendant.

Now at this day comes plaintiff and moves the court to strike out all of defendant's amended answer filed herein, except the following portion, viz: "Defendant denies that, on or about the second day of February, A. D. 1867, or at any other time, defendant entered into any contract or agreement with plaintiff, as alleged in his said petition," for the following reasons:

1st. Because the part of said ans. sought to be striken out is mere surplusage, and affords no defence to plaintiff's cause of action.

2nd. Because the same is inconsistent with the denial of the contract as plead.

3d. Because is wholly immaterial.

4th. Because the same sets up another and different contract
30 & then justifies a breach of such latter contract.

5th. Because the same pleads an offset without showing that such offsets arose out of the contract or transaction counted upon by plaintiff.

6th. Because the same tenders an immaterial issue.

THAYER & HARDIN,
Att'ys for Pl'ff.

And afterwards, at said last-mentioned term of said circuit court, the

following further proceedings were had in this case, on Tuesday, October 11th, A. D. 1870, to wit:

Motion to strike out part of def't's amended ans. sustained.

Removed from circuit court of St. Louis County.

B. FRANK PARTRIDGE, PLAINTIFF,
ag'st
THE PHŒNIX MUTUAL LIFE-INSURANCE COMpany, defendant.

This day come the parties, by their respective attorneys, and the court having examined the motion heretofore filed by said plaintiff to strike out part of defendant's amended answer herein, and being duly advised of and concerning the same, now orders that said motion be, and is hereby, sustained.

Amended answer withdrawn by defendant.

Thereupon defendant, with the leave of court, withdraws his said amended answer.

And afterwards, on the said 11th day of October, the following further proceedings were had in this case, to wit:

Hearing of the cause.

Removed from circuit court of St. Louis County.

B. FRANK PARTRIDGE, PLAINTIFF,
ags.
THE PHŒNIX MUTUAL LIFE-INSURANCE COMpany, defendant.

This day come again the parties, by their respective attorneys, and, this case being regularly called for trial, and both parties being ready, it is ordered that a jury come.

And thereupon comes said jury, to wit, Benjamin Phillbert, David Thomas, William C. Ellis, Robert J. Maize, W. R. Agard,
31 James F. Jones, John Shirts, John P. Sebree, Solomon Musser, Martin R. Streeter, Riley Shevill, and John Caldwell, twelve good and lawful men, who were sworn well and truly to try the issues joined herein.

And thereupon the hearing of said case was commenced, and said case in part heard, and the hearing thereof not being concluded at the hour of adjournment, it is ordered that further proceedings herein be continued until to-morrow morning.

And afterwards, at said last-mentioned term of said circuit court, the following fur[illegible] proceedings were had in this case, on Wednesday, October 12th, [illegible]870, to wit:

Hearing continued.

Removed from circuit court of St. Louis County.

B. FRANK PARTRIDGE, PLAINTIFF,
ag'st
THE PHŒNIX MUTUAL LIFE-INSURANCE COMpany, defendant.

This day come again the parties, by their respective attorneys, and the jury sworn herein being also present, the hearing of this case was resumed

And said case was further heard, and, the hearing thereof not being concluded at the hour of adjournment, it is ordered that further proceedings herein be continued until to-morrow morning.

And afterwards, at said last-mentioned term of said circuit court, the following further proceedings were had in this case, on Thursday, October 13th, A. D. 1870, to wit:

Hearing continued.

Removed from circuit court of St. Louis County.

B. FRANK PARTRIDGE, PLAINTIFF,
ag'st
THE PHŒNIX MUTUAL LIFE-INSURANCE CO.,
defendant.

This day come again the parties, by their respective attorneys, and the jury sworn herein being also present, the hearing of this case was resumed.

32 And said case was further heard, and, the hearing thereof not being concluded at the hour of adjournment, it is ordered that further proceedings herein be continued until to-morrow morning.

And afterwards, at said last-mentioned term of said circuit court, the following further proceedings were had in this case, on Saturday, October 15th, A. D. 1870, to wit:

Hearing concluded.

Removed from circuit court of St. Louis County.

B. FRANK PARTRIDGE, PLAINTIFF,
ag'st
THE PHŒNIX MUTUAL LIFE-INSURANCE CO.,
defendant.

This day come the parties, by their respective attorneys, and the hearing of this case was resumed.

And the same was further heard, and the hearing thereof being concluded, said case was submitted to the jury sworn herein, who thereupon retired to consider of their verdict thereon.

And afterwards, at said last-mentioned term of said circuit court, the

following further proceedings were had in this case, on Tuesday, October 18th, A. D. 1870, to wit:

Finding.

Removed from circuit court of St. Louis County.

B. FRANK PARTRIDGE, PLAINTIFF,
ags.
THE PHŒNIX MUTUAL LIFE-INSURANCE CO.,
defendant.

This day come again the parties, by their respective attorneys, and the jury sworn herein being also present, said jury now returned into court the following verdict in this case, to wit: "We, the jury, find for the defendant and against the plaintiff, and find for the defendant on its counter-claim, and assess damages in favor of defendant on said counter-claim in the sum of one dollar.

"DAVID THOMAS,
"*Foreman.*"

Judgment.

It is therefore now considered by the court that the plaintiff, B. Frank Partridge, take nothing by his writ herein, and that the defend-
33 ant, the Phœnix Mutual Life-Insurance Company, go hence without day and recover against the said plaintiff the sum of one dollar, the damages so as aforesaid found to be due and assessed by the jury in favor of said defendant; and, also, the costs in this behalf expended; and that execution be issued therefor.

Motion for a new trial by plaintiff filed.

And thereupon said plaintiff files his motion to set aside the verdict herein, and to grant a new trial, for the reasons in said motion set forth.

And the motion for new trial, filed as aforesaid by the plaintiff, is in the words and figures following, to wit:

Motion for a new trial.

B. F. PARTRIDGE
vs.
THE PHŒNIX MUTUAL LIFE-INSURANCE COMPANY.

Now at this day comes the plaintiff and moves the court to set aside the verdict of the jury and grant him a new trial, for the following reasons:

1. Because the jury misconceived the evidence, and instructions of the court.

2. Because the verdict is manifestly erroneous in any view of the case.

THAYER & HARDIN,
Att'ys for Pl'ffs.

And afterwards, at said last-mentioned term of said circuit court, the following further proceedings were had in this case, on Wednesday, October 19th, A. D. 1870, to wit:

Motion for new trial granted.

Removed from circuit court of St. Louis County.

B. FRANK PARTRIDGE, PLAINTIFF,
ag'st
THE PHŒNIX MUTUAL LIFE-INSURANCE CO., defendant.

34 This day comes the plaintiff, by attorney, and the court having examined the motion heretofore filed by said plaintiff to set aside the verdict herein, and to grant a new trial, and being duly advised of and concerning said motion, doth sustain the same, and accordingly orders that the verdict and judgment herein rendered be, and the same are hereby, set aside, and that a new trial be had in this case at the next term of this court, until which time this case is now ordered to be continued.

And afterwards, at a regular stated term of the said circuit court, to wit, at the April term, A. D. 1871, the following further proceedings were had in this case, on Wednesday, April 5th, A. D. 1871, to wit:

Hearing.

Removed from circuit court of St. Louis County.

B. FRANK PARTRIDGE, PLAINTIFF,
ag'st
THE PHŒNIX MUTUAL LIFE-INSURANCE COMpany, defendant.

This day comes the plaintiff, by his attorneys, Amos M. Thayer, esquire, and James T. Hardin, esquire; and also comes the defendant, by its attorneys, Mess. Cline, Jamieson and Day, and Frank Eno, esquire, and this case being regularly called for trial, and both parties being ready, it is ordered that a jury come, and therefore comes said jury, viz. Alfred P. Warfield, William W. Todd, John A. Brown, Henry C. Murdock, James P. Jackson, John A. Winn, Hampton Brown, Abraham Ray, William Barton, James H. Baker, Francis D. Phillips, and Talman House, twelve good and lawful men, who were sworn well and truly to try the issues joined in this case; and who, after hearing the evidence submitted herein, returned into court the following verdict, to wit:

Verdict.

We, the jury, find against the plaintiff in his cause of action, and for the defendant on its counter-claim, in the sum of seventeen hundred seventy-two dollars.

ALFRED P. WARFIELD,
Foreman.

35 *Judgment.*

It is therefore now considered by the court that the defendant, the Phœnix Mutual Life-Insurance Company, recover against the plaintiff, B. Frank Partridge, the sum of seventeen hundred seventy-two dollars, the damages, so as aforesaid by the jury assessed, and also the costs in this behalf expended, and that execution be issued therefor.

And afterwards, at said last-mentioned term of said circuit court, the following further proceedings were had in this case, on Thursday, April 6th, A. D. 1871, to wit:

Bill of exceptions filed.

Removed from St. Louis circuit court.

B. FRANK PARTRIDGE, PLAINTIFF,
vs.
THE PHŒNIX MUTUAL LIFE-INSURANCE COMPANY, defendant.

This day comes the plaintiff, by his attorneys, Mess. Hardin & Thayer, and presents to the court his bill of exceptions in this case, which, being examined by the court, is signed, sealed, and ordered to be made part of the record herein.

And the bill of exceptions, referred to in the foregoing order, is in the following words and figures, to wit:

Bill of exceptions.

B. FRANK PARTRIDGE
vs.
PHŒNIX MUTUAL LIFE-IN. CO.

Be it remembered that this cause came on for trial at the April term, 1871, of the United States circuit court for the districts of Missouri, and on the 3d day of said term, it being the 5th day of April, 1871, and both parties appearing by their attorneys, and having severally announced ready for trial, and a jury having been duly empanneled, plaintiff proceeded with his testimony, as follows:

36 B. F. PARTRIDGE, plaintiff, being sworn, testified as follows:

On the 2d day of Feb'y, 1867, Mr. L. E. B. Winslow was State agent of the Phœnix Mutual Life-Insurance Company for the State of Missouri. At that time I made arrangement with him to go into partnership with him in the State agency of def't in Missouri, & we wrote to the company to that effect. In answer to that letter Mr. Winslow received the following letter in reply, viz:

"E. FESSENDEN, *Pres't.* H. J. MORSE, *Vice Pres't.* J. F. BURNS, *Sec'y.*

"PHŒNIX MUTUAL LIFE-INSURANCE COMPANY,
"*Hartford, Conn., Feb'y 2d*, 1867.

"L. E. B. WINSLOW, ESQ.,
"*St. Louis, Mo.*

"DEAR SIR: Your favor of 28th ult'o is received, & contents noted.

We have lately made arrangements for the State of Minn. with a Mr. Tho's G. Jones, and he is very sanguine that he can make arrangements with you for a systematic and thorough working of the two States, which will prove mutually beneficial. We know whereof we speak when we tell you that he is a man second to none in the West for energy and sound judgment, and we ask you to hold on *to* you have had a chance to make his acquaintance. We would not be understood as saying one word against Mr. Partridge, and think that matters can be arranged as to have him one of the workers for the co. I cannot see why it should not be so. All it is now necessary to say is, that it is better to wait a little before making anything like a permanant arrangement.

"Very truly, yours,

"J. F. BURNS, *Sec'y.*"

37 I continued to work with Mr. Winslow, soliciting and forwarding application' for policies, & the policies were issued on such applications, and returned for delivery. In a few weeks Mr. Tho's G. Jones, the gentleman mentioned in the letter to Winslow, of Feb'y 2d, 1867, came on to St. Louis, and Jones, Winslow, and myself had a conversation, in which it was agreed Winslow should retire, & Jones & myself were to be partners in the State agency. In a few days, in April, perhaps, Jones went on to Hartford to close up the matter, and enter into a written contract with the company. He never returned, and I learned he went to the agency for Minnesota and Iowa. After Mr. Jones went east, I continued to solicit and forward applications for policies, & the company issued the policies on such applications & returned them to be countersigned by me, and I delivered them, and collected the premiums, and deducted twenty per cent. commissions on all first premiums. On the first of May, 1867, I made my first report to the company as their agent, and they received it, and from that time on I made regular monthly reports as their agent. In May, 1867, I, by direction of the company, took out a license for them as required by the laws of Missouri, and paid for it out of their funds, & reported to them the cost, &c. At the time Winslow left the agency, which was, I think, in March, 1867, there was in the office a few policies—those first mentioned in the petition—which he turned over to me, and after he retired the company sent me the renewal receipts, and I collected the renewal premiums on those policies, and retained seven and one-half per cent. commission on all renewal premiums thus collected. I continued so to act, and was recognised by them as their agent in St. Louis. On the 3d day of September, 1867, I sent defendant the following letter:

"ST. LOUIS, *Sept. 3d*, 1867.

"J. F. BURNS, Esq., *Sec'y, &c.*,

38 "DEAR SIR: I have had an interview with Mr. G. W. Wade, relative to the application of Felter & Wade for an agency of your company. They are doing a general insurance business in fire & marine, & Mr. Felter is sec'y of the St. Louis Floating Dock & Insurance Company. Neither of them have ever had any experience in life-insurance. They do not care to have the general agency of the State, but merely have an agency of the company, in which to place such life-risks as they may obtain in the prosecution of their regular business, & for the sole purpose of obtaining all the commissions, as well as renewal. Mr. Felter is now in the East, and may or may not call on you. I am free to con-

fess a little surprise at your remarks, coupling them with the general agency of the State of Missouri. I supposed it was settled that Mr. Jones & myself were to occupy the position of State agents. And just here permit me to enquire what my status is, if the State agency is open to the trial of candidates.

"Very truly, yours,

"B. F. PARTRIDGE, *Agent.*"

In reply to this letter, I received the following letter from defendant:

"E. FESSENDEN, *Pres't.* J. F. BURNS, *Sec'y.*

"PHŒNIX MUTUAL LIFE-INSURANCE COMPANY,
"*Hartford, Ct, Sept.* 7, 1867.

"B. F. PARTRIDGE, Esq.,
"*St. Louis, Mo.*

"DEAR SIR: Your favor of 3d is received—contents noted. Concerning your status in Mo., it is simply this: You are there working
39 up a business for yourself, and are paid the highest commissions which we pay, and in any arrangements which we may make for the State, will not overlook your interests, but we had no idea of giving you the exclusive control of a State which it will require a most experienced agent to take charge of and work up. We would have been willing to associate you with Mr. Jones, but have given him and his partner Minn. and Iowa, and must wait until we find just such another man for Mo., when, if we can, we will associate him with you, or, if we cannot, allow you to work independent of him. What has become of Winslow?

"Yours, truly,

"J. F. BURNS, *Sec'y.*"

After I received the letter of the 7th of September, I understood it, and was satisfied with it, and continued on as their agent, soliciting policies, collecting premiums and renewals, & reporting as required by the rules of the company. Thereafter I received from the company the following letters in due course of mail after their several dates, viz:

"E. FESSENDEN, *Pres't.* J. F. BURNS, *Sec'y.*

"PHŒNIX MUTUAL LIFE-INSURANCE CO.,
"*Hartford, Ct, Oct.* 4, 1867.

"B. F. PARTRIDGE, Esq.,
"*St. Louis, Mo.*

"DEAR SIR: Your favor of 30th ulto. is received. We have been talking about your State to a Doctor Jennings, a gentleman of great experience in insurance business, and on yesterday I made him certain offers which he is either to reject or accept inside a week. Now if the arrangements are perfected, we must refer Messrs. Felter and Wade to him, and therefore at the present writing we are not in a condition to
40 say anything definite on the subject, but it doesn't strike me favorably to have the gentleman in question countersign policies. We shall see, however, in a week or so, how the thing will come out. In talking with Dr. Jennings, I mentioned you, and made it a condition of the offer that you were to have all business in the State up to the present, and that you were to be permitted to go on in your usual way, doing what you can for your own account, so that the arrangement don't

affect you in any way, if it should be perfected; thus you see we have not been unmindful of your interests. Our object is to get more business out of the State.

"Yours, truly,

"J. F. BURNS, *Sec'y.*"

"PHŒNIX MUTUAL LIFE-INSURANCE CO.,
"*Hartford, Conn., Dec.* 10, 1867.

"B. F. PARTRIDGE, Esq.,
"*St. Louis, Mo.*

"DEAR SIR: We have directed our special agent, B. H. Dye, to proceed to St. Louis, with a view to his making an effort to procure us a greater amount of business out of the State. You will, we feel assured, do all in your power to forward our views in the matter, and will proceed in your own way on your own account. His efforts will not conflict with yours.

"Yours, truly,

"J. F. BURNS, *Sec'y.*"

"E. FESSENDEN, *Pres't.* J. F. BURNS, *Sec'y.*

"PHŒNIX MUTUAL LIFE-INSURANCE CO.,
"*Hartford, Conn., Jan.* 15, 1868.

41 "B. F. PARTRIDGE,
"*Gen'l Agent, St. Louis, Mo.*

DEAR SIR: Yours of the 4th ult., enclosing report for month of December, and draft for $90.07, is at hand. The report has been examined and found correct.

"Yours, truly,

"J. F. BURNS, *Sec'y.*"

"PHŒNIX MUTUAL LIFE-INSURANCE CO.,
"*Hartford, Conn., Feb'y* 5, 1868.

"B. F. PARTRIDGE, Esq.,
"*St. Louis, Mo.*

"DEAR SIR: Your favor of 31 ult. is received, enclosing permit for Mrs. Jewell, policy 24473. We herewith return same, and if the lady will not take it on the very low rate extra charged, you can return it with the policy. It does not appear to us that we should alter it.

"Yours, truly,

"J. F. BURNS, *Sec'y.*"

I then received from them a letter (which I don't now find) complaining of me, & charging me with opposition to their interests, to which I sent the following reply, viz:

"ST. LOUIS, MO., *Feb'y* 11, 1868.

"J. F. BURNS, Esq.,
"*Secretary, Hartford, Conn.*

42 "DEAR SIR: I am in receipt of your very strange letter of 4th inst. In the first place, you charge me with what I know to be false and you certainly did not know to be true, when you say, 'You seem to have cast all the impediments in the way of Mr. Dye which you could to arrange our business in Mo. on a successful basis,' and you incautiously admit this, inasmuch as you did not state a single particular

in which I had done what you charge. You certainly would not consider a man competent to work up or watch over your business in this State who showed so little good sense as to see the profit of a year's continuous hard labor quietly taken out of his hands and placed beyond his reach forever, just because the company, in ignorance of the facts and circumstances connected with their business, supposed, or were likely to be led to suppose, they were taking a short cut to a successful business in the State. If you have taken me for a man of that kind it is no fault of mine. It seems to me that you ought to have known that I was working under your 'bona-fide' promise that if no arrangement was made by which I was to continue an interest in the State agency, I should have an independent agency for myself, and work in my usual way on my own account. You have too much intelligence to have supposed that I was working for the honor alone of representing the Phœnix in this State. You ought to have known better than to have expected or asked me to take an agency under any one else and receive only sub-agents' commissions. It seems clearly to me that whatever wrong has been attempted in the matter was to bear on my shoulders. I threw no obstructions whatever in the way of Mr. Dye's placing the business of the company in the hands of whoever he pleased. I only objected to letting the business which I have worked up go out of my hands, and in this you know I did just what you or any other sane man would have done. You profess yourself satisfied as to my ability to increase your business in this locality, and add, 'but it does not follow
43 that you can do all the business which ought to come out of the State.' Now, sir, I have said, and I again repeat it, all I want is to have an independent agency here. I do not want to 'entirely occupy the field,' and you not only do me an injustice but make yourself ridiculous in charging me with any such aspirations; and yet, in justice to myself, I must add that I have confined myself to the limits of this county alone, by your direct orders. With regard to Mr. Dye, you suggest that my course should have been, 'instead of making myself disagreeable, to have quietly written you, telling you what were the plans of Mr. Dye, and at the same time given you my own views.' You will readily comprehend the absurdity of your remark when I tell you that I did all in my power to make it pleasant and agreeable for Mr. Dye, and do not think he will charge me with doing anything to annoy or embarrass him, but he in return did not communicate to me even the object of his visit here. I knew nothing of his plans whatever until the time arrived for him to consummate them. Then how could I communicate them to you? Was it my place to pump him, or his to have been frank and manly about his errand? He came here as your representative—your superintendent. Was it fit or reasonable in me to assume that he was not equal to his duties? Now, the fact is, and I trust you will agree with me, that your letter was based upon a false conception of the facts, or entirely too fretful to become the dignity of the position you occupy. As to the matter of Mr. Lamb giving me $1,000 to transfer my interest to him, the idea of the co. advancing the money and charging it over to Mr. Lamb, to be paid out of his commissions, was suggested by Mr. Dye, and I do not, therefore, consider myself open to the rebuff you give on that point. Allow me, however, to correct one error into which you seem to drift, viz., that the commissions have paid me for the work I have done. There are five home companies and over (30) thirty eastern companies with agencies in this city, and,
44 of course, a great deal of competition. In many cases agents do not get a cent of the commissions on first premiums. I have

often, in order to secure a risk for you, foregone all my first commission, looking alone for my compensation to commissions on renewals, and herein lies the profit, or the greater part of it, of my year's labor. If you want to put a State agent at work here in Missouri, why, do so; you need have nothing to fear from any opposition or obstruction from me. All I ask is that you do by me as you have agreed, and I shall have no reason to object to your having as many agents in the State or city as you think profitable. All this I am ready to reduce to a written contract—in fact, it seems entirely proper that it should be done, that we may at once, and without any further skirmishing, know exactly what to expect of each other. I have therefore drafted a contract, enclosing it herewith, which, if satisfactory to you, will be to me, or, if you prefer to draft one, it will be equally satisfactory to me, provided it be drawn in accordance with the terms of your letter to me, bearing date Sept. 7, 1867. Now, as to the matter of our publishing the annual statement of the Phœnix, I think it will do the company no harm; besides, it is in conformity with the laws, which the agencies of foreign companies are bound to obey. I enclose statements of the 'Mutual Benefit & Security,' as they appeared in our city papers, from which you can see the form used. I also enclose power of attorney, which I desire to have executed. If all is satisfactory, please return to me, and I will sign and return to you a counterpart of the contract.

"Respectfully, yours,

"B. F. PARTRIDGE."

To that letter I received the following reply, discharging me from the agency of said company:

"E. FESSENDEN, *Pres't.* J. F. BURNS, *Sec'y.*

"PHŒNIX MUTUAL LIFE-INSURANCE CO.,

45 "*Hartford, Conn., Feb'y* 15, 1868.

"B F. PARTRIDGE, Esq., *St. Louis, Mo.*

"SIR: Your letter of 11th inst. is received, and it is only necessary to say of it, that a communication so improper and insulting never before entered this office; and further, that it demonstrates your utter unfitness for any position which would involve correspondence with those who know anything of the conventionalities of society. We must protect ourselves from insult, and, in order that we may be free from it, (so far as you are concerned,) dismiss you from the employ of the company on and after the date of the receipt of this letter, which will be the 19th inst. You will turn over all books and property of the company, of whatever description it may be, to Mr. B. H. Dye, who is instructed to settle up all accounts with you, and through whom all future communications must be made, as we give you notice that any direct communication will be returned you unopened. This course your conduct makes necessary.

"Yours, &c.,

"J. F. BURNS, *Sec'y.*"

In November, 1867, I received from the company, for distribution, their published rates in the form of a book, the title-page of which was as follows: Here plaintiff offered in evidence the title-page of a copy of the book referred to, which is as follows, viz:

Dividends annually..... 50 per cent.
Assets..... 2,000,000.00[0].

PHŒNIX MUTUAL
{ State seal of }
{ Connecticut. }
LIFE-INSURANCE COMPANY, HARTFORD, CONN.

B. F. PARTRIDGE,
Gen'l Agent, St. Louis, Mo.

46 Here plaintiff admitted that he had received twenty per cent. commission on all first premiums, and seven and one-half per cent. commissions on all renewal premiums that had been actually collected by him, and that there was in his hands, at the time of his discharge, $1,772.00 in money, the property of the company, if they were not liable to him for the value of future commissions to accrue on the policies.

It was then distinctly announced by the plaintiff that the real point of dispute and litigation in the cause was this, viz: Plaintiff claims that, under the facts and circumstances of his employment and service, the letters and correspondence had with him by the company, and particularly by the terms of the aforesaid letter of Sept. 7, 1867, and by force and virtue of a general usage existing in St. Louis at that time in regard to the business of life-insurance companies and their agents, he was entitled to retain the agency, &, in case of his removal against his will, and without sufficient cause, he was entitled to be paid a commutation equal to the present value of his commissions, computed by the actuarial rule for computing the present value of policies.

Defendant claims that they are not bound by any usage except that of their own company; that plaintiff was only their agent, at the will and during the pleasure of the company, and might be discharged at any time without cause, and was not entitled to any payment or commutation on policies solicited during his agency, except his commission actually accruing during his agency, which, it is admitted, he has received.

The plaintiff then propounded to the witness the following question, (the witness having first qualified himself as an expert in insurance matters, terms, and language:)

"Is there in the phrase contained in the letter of def't of Sept. 7, 1867, to wit, 'Concerning your status in Mo., it is simply this: You are there working up a business for yourself, and are paid the highest commissions which we pay'—any peculiar or technical meaning as used by men engaged in life-insurance, and as applied to the business of
47 life-insurance, different from the ordinary meaning of these terms?"

In answer to which question plaintiff offered to prove by this witness, and by many others experienced in life-insurance, that said phrase did have a peculiar meaning in that regard, well understood by men in the business of life-insurance, and not well understood by those not familiar with the life-insurance business; that the meaning of the phrase, as understood in that business, was that the agent should have the right to solicit and cause policies to be issued according to the published rules and rates of the company, and should have the right during the life and force of such policies to collect all renewal premiums thereon, and have commissions on such renewals, & that if he was discharged by the company without sufficient cause, he was entitled to be paid immediately, the present value of his commissions, to be computed by the actuarial rule used by such companies to value policies.

Which question was objected to by defendant, which objection was

by the court sustained, on the ground that the language referred to was plain and intelligible, and required no explanation, & refused to allow any testimony to be given by this or any other witness that said language had any peculiar or technical meaning as used in that letter, or any testimony to explain such meaning, and to show that its meaning was as above stated, for the reason that, as the court ruled, such evidence would vary the contract between the parties; to which ruling the plaintiff then and there duly excepted.

Plaintiff then propounded to the witness the following question:

"Was there at the time you entered the service of the defendant, and during the time you continued in its service, any usage in force among life-insurance companies and their agents in St. Louis, as to the rights and interests of agents in the premiums & commissions on policies solicited and procured by them, and determining the length of time such interests continued, and the rights of the agent when his agency ceased?"

And, in answer to this question, plaintiff offered to prove by this witness, and by many other witnesses, all experienced in the business, and familiar with the usage, that there was such a usage in
48 St. Louis at that time; that, by such usage, a general agent of a life-insurance company was entitled to retain his agency unless discharged for good cause, and if discharged without good cause, he was entitled to have paid to him the present value of his commissions on renewals to be computed by the actuarial rule for valuing policies.

To which question defendant objectioned; which objection was, by the court, sustained, on the ground that defendant was not bound by any such usage on the part of other insurance companies, for the reason that a contract inconsistent therewith between the parties was reduced to a memorandum in writing by the said letter of Sept. 7, 1867, recognized and assented to by the plaintiff; but informed plaintiff that he might prove the usage of this company here or elsewhere to establish the highest rate of commission paid by them at any time before his discharge, and refused to permit the pl'ff to give any testimony as to the usage of life-insurance companies, or life-insurance business, except only the usage of this defendant.

To which ruling of the court the plaintiff then and there duly excepted.

The plaintiff then propounded the following question: "What was the gross amount of the annual premiums on the policies solicited by you during your agency for this company?"

Here the court asked the counsel for the plaintiff the object of the question, and was informed by the counsel that the object was to fix a basis whereby to calculate and ascertain the present value of the commissions on renewals at the time of plaintiff's discharge, so as to determine the amount which plaintiff is entitled to recover.

Whereupon the court ruled that plaintiff had not shown any right to recover such present value of commissions, and ruled that plaintiff would not be permitted to show the value of such commissions until he first showed his right to recover; to which ruling of the court the plaintiff then and there excepted.

The above was all the testimony offered or given in the cause, or ruling made, pending the trial.

Whereupon the jury returned the following verdict:

(See page 34 of this transcript.)

49 The amount of the counter-claim was admitted.

And afterwards, to wit, on the next succeeding judicial day, it being the fourth day of the term, plaintiff duly filed his motion for new

trial; which motion was by the court overruled & a new trial refused; to which ruling of the court the plaintiff then and there duly excepted, and prays that this his bill of exception be signed, sealed, and made a part of the record in this cause, which is accordingly done.

JOHN F. DILLON, [SEAL.]
Circuit Judge.

And afterwards, to wit, on the fifteenth day of April, A. D. 1871, said plaintiff having been allowed a writ of error to the Supreme Court of the United States to reverse the judgment herein, filed in this court his bond in the sum of five hundred dollars, with B. F. Partridge and A. S. Partridge as surety; which bond is in the words and figures following, to wit:

Bond.

Know all men by these presents that we, B. F. Partridge and A. S. Partridge, are held and firmly bound unto the Phœnix Mutual Life-Insurance Company in the full and just sum of five hundred dollars, to be paid to the said Phœnix Mutual Life-Insurance Company, to which payment well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents, sealed with our seals and dated this fifteenth day of April, in the year of our Lord one thousand eight hundred and seventy-one.

Whereas lately at the April term, 1871, of the circuit court of the United States for the districts of Missouri in a suit depending in said court, between B. Frank Partridge, plaintiff, and the Phœ-
50 nix Mutual Life-Insurance Company, defendant, judgment was rendered against the said B. F. Partridge, plaintiff as aforesaid, and the said B. Frank Partridge, plaintiff as aforesaid, having obtained a writ of error of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Phœnix Mutual Life-Insurance Company, citing and admonishing it to be and appear at a Supreme Court of the United States to be holden at Washington the first Monday of December next:

Now the condition of the above obligation is such, that if the said B. Frank Partridge shall prosecute said writ to effect, and answer all damages and costs if he fail to make good his plea, then the above obligation to be void; else to remain in full force and virtue.

B. F. PARTRIDGE. [SEAL.]
A. S. PARTRIDGE. [SEAL.]

Sealed and delivered in presence of—
J. E. KENTON.
JAMES F. HARDIN.

Approved by—

SAMUEL TREAT, *Judge.*

(End of transcript.)

51 UNITED STATES OF AMERICA,
Circuit Court for the Districts of Missouri, ss:

I, Austin Drake, clerk of the circuit court of the United States in and for the districts of Missouri, do hereby certify the writing hereto annexed to be a transcript of the record and proceedings in case of B.

Frank Partridge against The Phœnix Mutual Life-Insurance Company, as fully as the same remain on file and of record in said case, in my office.

In witness whereof I hereunto subscribe my name and affix the seal of said court, at office in the city of St. Louis, in said districts, this eighth day of September, in the year of our Lord eighteen hundred and seventy-one.

[SEAL.] AUSTIN DRAKE,
Clerk of said Court.

52 (Indorsed:) United States circuit court, districts of Missouri. B. Frank Partridge against The Phœnix Mutual Life-Insurance Company. Duly-certified copy of the transcript of record and proceedings in the above-entitled cause.

53 UNITED STATES OF AMERICA, *ss:*

[SEAL.] The President of the United States to the honorable the judges of the circuit court of the United States for the districts of Missouri, greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, at the April term, A. D. 1871, between B. Frank Partridge, plaintiff, and the Phœnix Mutual Life-Insurance Company, defendant, a manifest error hath happened, to the great damage of the said B. Frank Partridge, as by his complaint appears:

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the first Monday of December next, in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Salmon P. Chase, Chief Justice of the said Supreme Court, this seventh day of April in the year of our Lord one thousand eight hundred and seventy-one.

Issued at office in the city of St. Louis, with the seal of the circuit court of the United States for the districts of Missouri, dated as aforesaid.

AUSTIN DRAKE,
Clerk C. C. U. S. Missouri Districts.

Allowed by—

SAMUEL TREAT, *Judge.*

54 UNITED STATES OF AMERICA,
Districts of Missouri, ss:

In obedience to the within writ of error, I herewith transmit to the Supreme Court of the United States a duly-certified transcript of the record and proceedings in the within-entitled case.

Witness my hand, at office in the city of St. Louis, Missouri, this twenty-seventh day of September, A. D. 1871.

AUSTIN DRAKE,
Clerk of the U. S. Circuit Court for the Districts of Missouri.

(Indorsed:) B. Frank Partridge, P. E., vs. Phœnix Mutual Life-Insurance Co., D. E. Writ of error.

55 The United States of America to the Phœnix Mutual Life-Insurance Company, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the first Monday of December next, pursuant to a writ of error, filed in the clerk's office of the circuit court of the United States for the districts of Missouri, wherein B. Frank Partridge is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Samuel Treat, one of the judges of the circuit court of the United States for the districts of Missouri, this seventh day of April in the year of our Lord one thousand eight hundred and seventy-one.

SAMUEL TREAT.

Rec'd notice and service of the above citation on this 15th day of April, 1871.

CLINE, JAMISON & DAY, WITH
ENO, *Att'ys for Defendant.*

(Indorsed:) B. Frank Partridge, P. E., vs. Phœnix Mutual Life-Insurance Company, D. E. Citation.

(Indorsement on cover:) No. 414. B. Frank Partridge, plaintiff in error, vs. The Phoenix Mutual Life-Insurance Company. Missouri C. C. U. S. Filed 27th November, 1871.

REC. 414—3

IN THE

SUPREME COURT OF THE UNITED STATES.

WASHINGTON, D. C.—DECEMBER TERM, 1871.

B. F. PARTRIDGE
vs.
THE PHŒNIX MUTUAL LIFE INSURANCE COMPANY.

Error to the Circuit Court of the United States for the Districts of Missouri.

JAMES F. HARDIN, *Counsel for Plaintiff.*

IN THE

SUPREME COURT OF THE UNITED STATES.

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vs.
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Error to the Circuit Court of the United States for the Districts of Missouri.

JAMES F. HARDIN, *Counsel for Plaintiff.*

STATEMENT.

This was an action commenced by the plaintiff in error against the defendant in error in the St. Louis State Circuit Court, returnable to the October term, 1868, of that court. The nature and object of the action is substantially assumpsit, to recover the present value of certain commissions on renewals of life insurance policies solicited by the plaintiff while general agent of defendant. At the return term the defendant appeared and answered, denying any contract of employment; but admitting that, during the time mentioned, plaintiff was *permitted* to solicit, and so forth, and setting up a counter-claim under the statutes of Missouri. The plaintiff filed a motion to strike out the greater part of the answer, which being overruled, the plaintiff replied to the counter-claim, &c.

At the April term, 1869, of the St. Louis Circuit Court, the defendant, being a non-resident corporation, filed a petition, as

required by act of Congress, for a removal of the cause to the United States Circuit Court for the districts of Missouri, which was accordingly removed, and process, and so forth, filed in United States Circuit Court at October term, 1869. At the April term, 1870, the cause was continued by consent. At the October term, 1870, the defendant filed an *amended answer*, substantially the same as the answer filed in State Court. The plaintiff moved to strike out the greater part of this amended answer, and the court sustaining the motion, the defendant voluntarily withdrew the amended answer. Thereupon the parties went to trial, and there was a verdict for the defendant for one dollar. The court, upon motion of the plaintiff, set aside that verdict and awarded a new trial, and the cause was then continued until the next term of the court. At the April term, 1871, of the court, the cause came on again for a hearing, and at that trial the errors complained of were committed, which will be fully pointed out hereafter. At this last trial there was a verdict and a judgment for the defendant for $1,772 on the counter-claim. The plaintiff then moved for a new trial, which being refused, he tendered his bill of exceptions, and brings the cause here by writ of error.

ASSIGNMENT OF ERRORS.

I. The court below erred in refusing evidence offered by the plaintiff.

II. The court below erred in taking the case from the jury, and deciding that plaintiff had furnished *no* evidence of his right to recover. His right to recover was not denied; there was no issue joined in the case, and the only question was the measure of damages.

III. The court erred in receiving and entering the verdict. There could be no such thing as an offset or counter-claim adjudicated in this case in the Circuit Court, even had it been pleaded; but the pleas, whatever they were, had been entirely withdrawn, and the court erred in receiving such a verdict and entering such a judgment, and for this reason alone the judgment should be reversed.

ARGUMENT AND BRIEF.

I. (*a*) The court below erred in refusing the evidence offered by the plaintiff. The plaintiff proposed to prove that certain words and phrases contained in the correspondence of defendant had a peculiar technical meaning and signification as applied to the business of life insurance, different from the ordinary meaning of the words, well understood by persons engaged in that business, but not well understood by others; and this testimony the court refused, on the ground that such testimony would vary the contract between the parties. It is a well-settled rule that extrinsic evidence is admissible in all cases, to enable the court to apply the terms used to the thing or business spoken of, in the sense in which such words were used and understood by the parties at the time of their use. (2 Phillips on Evidence, 4th Am. ed., 718, note 3 on p. 510.) The court could not know what the contract was without an explanation of these ambiguous terms, and yet the court held that to explain would vary the contract. "The law is not so unreasonable as to deny to the reader of any instrument the same light which the writer enjoyed." (Wigram on Extr. Ev. 57–8.) In Boorman *v.* Johnson, 12 Wend. 573, Savage, C. J., says: "Parol evidence may be given to apply the written contract to the subject-matter; in some instances to explain expressions used in a peculiar sense, *when used by particular persons and applied to particular subjects.* It is perfectly right and consistent with fair dealing to give effect to language used in a contract, as it is understood by those who make use of it." We proposed to show the meaning of this sentence, viz: "Concerning your *status* in Missouri, it is simply this: you are there working up a business for yourself, and are paid the highest commissions which we pay" (letter September 7, 1867), and for that purpose we offered the following testimony: "That said phrase did have a peculiar meaning in that regard, well understood by men in the business of life insurance, and not well understood by those not familiar with the life insurance business; that the meaning of the phrase, as understood in that business, was, that the agent should have the right to solicit and cause policies to be issued accord-

ing to the published rules and rates of the company, and should have the right, during the life and force of such policies, to collect all renewal premiums thereon, and have commissions on such renewals; and that, if he was discharged by the company without sufficient cause, he was entitled to be paid immediately the present value of his commissions, to be computed by the actuarial rule used by such companies to value policies."

The court below refused to permit the plaintiff to give the above testimony or make any explanation, or fix any meaning to the sentence, on the ground that such evidence would vary the contract between the parties, and holding that the language was plain and intelligible and required no explanation. How could the court say that there was no technical or special meaning, when we offered to prove positively that there was? Plaintiff then offered to prove a certain usage as follows:

"*Question.*—Was there, at the time you entered the service of the defendant, and during the time you continued in its service, any usage in force among life insurance companies and their agents in St. Louis as to the right and interest of agents in the premiums and commissions on policies solicited and procured by them, and determining the length of time such interest continued, and the rights of the agent when his agency closed?"

And in answer to the above question, plaintiff offered to prove by this and many other witnesses, all experienced in the business and familiar with the usage:

"That there was such an usage in St. Louis at that time; that by such usage a general agent of a life insurance company was entitled to retain his agency, unless discharged for good cause; and if discharged without good cause, he was entitled to have paid to him the present value of his commissions on renewals, to be computed by the actuarial rule for valuing policies."

This testimony was refused by the court, on the ground that we had given in evidence a written contract between the parties inconsistent with the usage, and that this company was not bound by the usage of any other company; ignoring the fact that we offered to prove that this was an usage of all companies, and again assuming to thoroughly understand the meaning of

the letter of September 7th, and in fact the whole subject, though we offered to prove that the court did not comprehend the letter of September 7th; and upon this theory the court refused all testimony in explanation of the conduct and correspondence of the parties, and the usage of the business of life insurance. It is too well settled to admit of controversy that a party may explain a written instrument by showing a custom or usage in reference to which the instrument was made or written; and this is precisely what we offered to do in this case, and what the court refused.

In Goodyear *v.* Ogden & Pearl, 4 Hill, 104, Cowen, J., said: "The import of the terms was controllable by the usage among wheat dealers—such as the defendants were—if that usage was so universal and well known that the jury were bound to consider it a parcel of the contract. But of this *they* were the judges."

So in this case the terms were controllable by the usages among life insurance companies and men—such as these were—if there was an usage or custom to which the terms could be referred. That there was such an usage we offered to prove, and also that that usage attached to the words in the letter of September 7, 1867, certain force and meaning, all of which was refused us. And in the following case the court says: "But it is argued that there was full proof of usage in the particular trade which went to explain the memorandum and establish an absolute sale of the grain. I do not deny that the receipts were open to explanation by this species of evidence." (4 Hill, 107; see also 2 Starkie on Ev. 258–9; Witherell *v.* Graham, 6 T. R. 398; Bushford *v.* Hadfield, 6 East, 519; Cooper *v.* Kane, 19 Wend. 386; Schooner Reeside, 2 Sumner, 567.)

Speaking of usage, Mr. Greenleaf says (vol. 2, § 251): "Their true office is to interpret the otherwise indeterminate intention of parties, and to ascertain the nature and extent of their contracts, arising not from express stipulations, but from mere implications and presumptions, and acts of a doubtful and equivocal character, and to fix and explain the meaning of words and expressions of doubtful or various senses." These are the very things we offered to show: first, that the language had a

peculiar meaning to the parties; and, second, by showing the usage to establish the meaning of the words. And so Judge Story (Story on Contracts, § 648) says: "Where words which are technical or mercantile, belonging to any art, trade, course of dealing or class of people, are introduced into a contract, their peculiar meaning is a question of fact to be determined by the jury, and to be gathered from experts; but, their meaning being determined, their legal bearing is a matter of law for the court to decide." And following this rule, Justice Shaw, in Eaton *v.* Smith, 20 Pick. 150, says: "When a new and unusual word is used in a contract, or a word is used in a technical or peculiar sense, as applicable to any trade or branch of business, or to any particular class of people, it is proper to receive evidence of usage to explain and illustrate it, and that evidence is to be considered by the jury;" and the same principle is fully recognized in Neilson *v.* Bonker, 8 Mees. & Wels. 806, and in 6 *ib.* 108, and in Peirce *v.* The State, 13 N. H., 531–62, and in Perth Amboy Manuf. Co. *v.* Condit, 1 N. J. 659, and in Wason *v.* Rowe, 16 Verm. 525. "Usage, therefore, is admissible for the purpose of determining the real intention and understanding of the parties when they are not determined by the actual terms of the contract." (Story on Cont., § 649.)

And in Clark *v.* Baker, 11 Metcalf, 189, and Snowden *v.* Warden, 3 Rawle, 181, it is held that a *local usage is good* though it contravenes a settled maxim of the law.

And Story further says: "It is also a general rule that a contract is to be expounded according to the law or custom of the place where it is made, where the actual intention of the parties in this respect is not expressly stated, but it is to be inferred from the nature, objects and occasion of the contract." (Story on Cont., § 653.)

A valid usage is a part of every contract entered into where it exists, and this rule is plainly laid down by Mr. Story in his work on Bills, p. 161.

See also Wallace *v.* Bradshaw, 6 Dana (Ky. Rep.), 385. There can be no doubt, then, that we had the right to give in evidence both the fact of the technical meaning of the letter and the usage to interpret that meaning.

And this doctrine is fully sustained by Gibbs, C. J., 2 Phillips Ev., 786, and Birch *v.* Depeyster, 4 Camp, 385; and the same doctrine is recognized and enforced in 2 Phillips Ev. 787; Baker *v.* Paine, 1 Ves. Sen. 459; Blunt *v.* Cumyns, 2 *id.* 331; Outwater *v.* Nelson, 20 Barb. 29; Thompson *v.* Sloan, 23 Wend. 71; Farnsworth *v.* Chase, 19 N. H. 534; Lee *v.* Killman, 3 Gray (Mass.), 594; Kenner *v.* Bank, 9 Wheat. 582; Mills *v.* Bank, 11 Wheat. 431; Stewart *v.* Scudder, 4 Zabr. 96; Foley *v.* Mason, 6 Mo. 37; Catlin *v.* Smith, 24 Vt. 85; 39 Barb. 620; 39 N. Y. Ct. of App. 98.

II. (*a*) The plaintiff then propounded the following question: "What was the gross amount of the annual premiums on the policies solicited by you during your agency for this company?" Here the court asked the counsel for the plaintiff the object of the question, and was informed by the counsel that the object was to fix a basis whereby to calculate and ascertain the present value of the commissions on renewals at the time of plaintiff's discharge, so as to determine the amount which plaintiff is entitled to recover. Whereupon the court ruled that plaintiff had not shown any right to recover such present value of commissions, and ruled that plaintiff would not be permitted to show the value of such commissions until he first showed his right to recover, to which ruling of the court the plaintiff then and there excepted.

The court clearly erred in the above ruling. It was for the jury to determine the weight to attach to the evidence. It was for them to say what the letters, &c., meant, and the court erred in taking the case from the jury, and thus summarily disposing of it.

It is a rule well settled in the practice, that where there is *any* evidence the case must go to the jury, and let them find what that evidence proves. The effect of the ruling was to exclude from the jury *all* of plaintiff's evidence, and this without any motion for that purpose. If the evidence tended to prove the facts, or any of them, it would have been error to exclude. (Sheppard *v.* Starrett, 35 Mo. 367.) It is error for a court to comment on the testimony. (Chouquette *v.* Barada, 28 Mo. 491; Anderson *v.* Kinchelow, 30 Mo. 520; Chambers *v.* McGeverson, 33 Mo. 202; Farrar *v.* David, *id.* 482; State *v.* Stout, 31 Mo. 406.)

If there is any evidence introduced tending to prove a fact relied upon by a party to a suit, it is error to refuse instructions putting that fact to the jury. (Ridens *v.* Ridens, 29 Mo. 469.

Whether or not plaintiff was entitled to the present value of commissions on renewals, was a question of law depending upon the contract, but what the contract was was a question of fact to be determined by the jury, under the proper charge of the court. The meaning of the letters, correspondence and conduct of the parties were questions of fact which a jury had been called to determine, and those evidences were before the jury; and the court committed gross and manifest error in ruling that plaintiff had furnished *no* evidence of his right to recover. (Maies *v.* Eddy, 28 Mo. 382; Ragan *v.* McCoy, 29 Mo. 356; Huelsenkamp *v.* Citizens' R.R. Co., 34 Mo. 45; Chappel *v.* Allen, 38 Mo. 213.)

Courts should not, in instructions to a jury, take for granted facts in issue in the cause. (Chouquette *v.* Barada, 28 Mo. 491; Merritt *v.* Given, 34 Mo. 98; Turner *v.* Loler, 34 Mo. 461; Moffat *v.* Conklin, 35 Mo. 453; Sawyer *v.* H. & St. Jo. R.R. Co., 37 Mo. 240.)

Where a presumption is one of fact, the court cannot declare it to the jury as a presumption of law. (Ham *v.* Barrett, 28 Mo. 388.)

In this case the issue was one of fact. What was the contract? Evidence had been given to the jury tending to prove what the contract was, and still remained before them, and it was their province to determine from this evidence what the contract was; but the court ruled that there was *no evidence*. If so, then the evidence should have been excluded. The court cannot give the evidence to the jury, and then inform them that it is a mere farce, and that it proves nothing. They are the sole judges of what it proves. The court supervises the introduction of testimony, and passes, in the first instance, on the relevancy and competency. These being conceded, the court then charges the jury what facts are necessary to find in order to find for the plaintiff, and on failure to find these facts they will find for the defendant; and this is the extent of the power of the court when a jury is called to try the issues. The court cannot take the case out of the hands of the jury by ruling that

certain evidence does not prove certain facts. If so, the office of the jury is entirely destroyed; a jury trial is an expensive piece of nonsense—a mere vain show—an incomprehensible farce.

It is submitted that the court, in this ruling, committed such manifest error that the judgment must be reversed.

III. (*a*) The defendant had withdrawn her answer, and, of consequence, there was no issue joined in the case, and the only question was the amount of damages; hence the court committed fatal error in ruling that plaintiff must show his right to recover. His right to recover was not denied. (33 Mo. 244; *id.* 110; 28 Mo. 39; 46 Mo. 110.)

The defendant having filed an amended answer, and then having withdrawn the amended answer, left the case unanswered.

III. The court erred in entering judgment for defendant for any sum. In the courts of the United States, and especially those for the Districts of Missouri, the pleading and practice is according to the common-law mode, except so far as it is modified by rule, which at that time only went so far as to provide that the practice in this court should be the same as that under the practice act of Missouri of 1835, so far as the same was not in conflict with any law, &c., of the United States.

By the common law, the laws, &c., of the United States, and the practice act of Missouri of 1835, no offset or counter-claim could be pleaded to an action of assumpsit or damages.

A party might plead payment, or might recoup certain damages, but could not put in a counter-claim.

Hence, had this suit been first brought in the Circuit Court of the United States, no offset or counter-claim could have been pleaded or allowed.

Does the fact of the case coming from a State Court in any way enlarge the powers or change the practice in the Circuit Court of the United States?

The defendant had pleaded an offset in the State Court, and then voluntarily took the case to the Federal Court. Shall the defendant have all the advantages of both courts, without the burdens of either, or shall it abide by the rules and regulations of the court of its choice?

It is submitted that when defendant elected to remove the cause to the Federal Court for trial, it abandoned all claims and

rights under the State code of practice, and was in all things bound to conform strictly to the rules of practice in the Federal Court. Hence, we say that the Circuit Court committed manifest error in receiving the verdict and entering judgment against the plaintiff for $1,772.

The construction which we claim for the letters and conduct of the defendant is not unreasonable; neither is the usage claimed immoral or against common right. The letter of September 7th is clearly susceptible of no other construction than that plaintiff had, and was to continue to have, a continuing interest in the business he was "working up;" but if it is capable of different constructions, we are entitled to that most favorable to us; and the letter of October 4th confirms our views of the meaning of the letter of September 7th.

The court committed manifest and fatal error in taking the case from the jury and ruling that there was no evidence. The court had been denied the right to try the issue of fact by the parties calling jury; certain letters and parol testimony were before the jury, and the court could only charge them on the law, and leave them to determine the facts under the charge of the court as to the law of the case.

This case is clearly distinguishable from the case of Stagg *v.* Conn. Mut. Life Ins. Co. There was a contract fixing both rate of payment and duration of interest.

Stagg was to have certain fees "so long as you act as agent;" here defendant says: "You are there working up a business for yourself, and are paid the highest rates we pay."

T. W. Bleeco

Of Counsel

IN THE

SUPREME COURT OF THE UNITED STATES.

DECEMBER TERM, 1871:

B. FRANK PARTRIDGE,
Plaintiff in Error,
vs.
THE PHŒNIX MUTUAL LIFE INS. CO.,
Defendant in Error.

STATEMENT AND BRIEF OF DEFENDANT IN ERROR.

The sole basis of the plaintiff's cause of action, as shown by the evidence, is a letter written to him (p. 25) by the secretary of the defendant, dated Sept. 7th, 1867, wherein he tells the plaintiff "concerning your status in Missouri, it is simply this, you are there working up a business for yourself, and are paid the highest commissions which we pay." This letter the plaintiff testified (p. 25) he was satisfied with; and by a letter to the company, written Feb. 11th, 1868, (p. 28) claimed that his rights were defined by the above letter of Sept. 7th, 1867. And there is no pretense that anything ever occurred between the plaintiff and the company defining his rights or compensation for services except the letter of the secretary above alluded to. The plaintiff under this state of facts asked (p. 29) to show that the phrase above alluded to in the letter of the secretary had,

by virtue of a usage existing in St. Louis, a peculiar meaning, understood only by men engaged in the business of life insurance, which was, that the agent should have the right to solicit policies, and to collect the renewal premiums during the life of the policies and have commissions on such renewals, and that if wrongfully discharged by the company, that he should recover the commuted value of the commissions on the renewals of the policies. The plaintiff also asked (p. 30) to show, that at the time plaintiff became and acted as agent of the defendant, there was a custom in St. Louis determining the rights and interests of agents of Life Insurance Companies, in policies obtained by them. All of this evidence the Court excluded, on the ground that the contract, as contained in the letter of the Company, was explicit and without ambiguity, and that no usage of the kind suggested could affect the defendant. And certainly there is nothing technical, obscure or ambiguous in the phrase alluded to in the letter to the plaintiff, and upon which his action is based. The words are such as are in common use and have a well defined and understood meaning. The compensation to be received by the plaintiff is expressly provided for as being the highest commission paid by the defendant. Any custom among insurance companies or their agents at St. Louis could not in any event affect the defendant, a company existing (p. 1) in Hartford, Conn., at which place the letter (p. 25) was written. But if the usage had been an universal one, it could not affect either the plaintiff or the defendant, because they had expressly agreed that the plaintiff's compensation should be controlled by the rates paid by the defendant to its agents, which may, or may not have been the customary rates paid to the agents of other companies.

The plaintiff did not offer or attempt to prove the rate of commissions paid on renewal premiums by the plaintiff to its agents, after they ceased to act as such; and thus left his case entirely barren of any evidence by which the court or jury could determine what, if any, compensation he should receive or was entitled to recover; consequently the plaintiff, having admitted

(p. 29) that he had received his commissions on all premiums that had been collected by him up to the time of his discharge (and $1772 00 in addition), the Court properly excluded any evidence as to the commuted value of the commissions on future premiums on policies obtained by him during his agency. The plaintiff, by his arrangement with the defendant, was put in the position and given the rights of its most favored agents, and his rights could be ascertained by reference to the compensation paid by the Company to such agents, and not by giving vague and extraordinary meanings to plain and intelligible words, or by any usage of other companies or their agents at St. Louis. As to the correctness of the rulings of the Court above referred to, we cite the opinion of Dillon, J., in this case: 1 Dillon, 140; also—

Stagg *vs.* Insurance Company, 10 Wallace, 589.
Barnard *vs.* Kellegg, 10 Wallace, 383.
The Schooner Reeside, 2 Sumner, 567.
Eaton *vs.* Smith, 20 Pick., 150.
Garrison *vs.* Memphis Ins. Co., 19 How., 312.
Charlton *vs.* Gibson, 1 Carrington & Kirwan, 541.

The plaintiff in error complains because a judgment was rendered in favor of the defendant on its counter claim.

The Acts of Congress of 1866, and that of 1867, which is amendatory thereof, contemplate that after a suit, removed from a State Court has been entered in the United States Court, it shall proceed in the same manner as if it had been brought there by original process, and the pleadings have "the same force and effect, in every respect, and for every purpose, as the original pleadings would have had by the laws and practice of such state if the cause had remained in the State Court."

And the argument which is made by the plaintiff, that a counter-claim could not be maintained in this case, because not warranted by the Missouri Practice Act of 1835, is, if good for anything, equally imperative against himself, for his petition in the case, though good under the present State practice, would be entirely insufficient and irregular as a declaration under the Practice Act of 1835.

It will be observed that the counter-claim is contained in the answer filed in the State Court (p. 7). After the case had been removed to the Federal Court (p. 14), the defendant filed an amended answer, which was afterward (p. 19) withdrawn by leave of court, thus, as it is claimed, reinstating the original answer, and it was so considered and treated by the court and the parties; and immediately, on the same day, the parties went to trial, and, after a hearing of several days, the jury (p. 21) found against the plaintiff and in favor of the defendant, on its counter-claim, in the sum of one dollar. The plaintiff made a motion for a new trial (p. 21), which was sustained, no reference having been had as to the verdict on the counter-claim being unwarranted by the pleadings or the practice of the court, but the complaint was that the verdict was not consistent with any theory of the evidence. At the last trial, the jury found a verdict on the defendant's counter-claim (p. 22) for $1,772 00. This amount the plaintiff, in his evidence, admitted, at the trial, belonged to the Company, unless it was liable to him for future commissions to accrue on the policies, and (p. 30) "at the trial the amount of the counter-claim was admitted;" thus showing expressly that the matter of the counter-claim was considered as being in the pleadings and in controversy in the case.

And the plaintiff, by his admission made at the trial, and to the court, is estopped from making an objection which is not only in the face of his own solemn admission, but also one which he has failed to raise or make in the court below by motion for a new trial, in arrest of judgment, or otherwise.

N. P. CHIPMAN,
Attorney for Defendant in Error.